No. 99-1702-CSY Title: Texas, Petitioner
v.
Raymond Levi Cobb

Docketed: April 21, 2000 Court: Court of Criminal Appeals of Texas

Entry	Date	Proceedings and Orders
	Apr 21 2000	Petition for writ of certiorari filed. (Response due June 22, 2000)
	May 3 2000	Order extending time to file response to petition until June 22, 2000.
	May 8 2000	Motion of respondent for leave to proceed in forma pauperis filed.
	Jun 5 2000	Application (99A1007) for a stay of enforcement of the judgment of the Texas Court of Criminal Appeals, submitted to Justice Scalia.
	Jun 7 2000	Response to application (99A1007) from Raymond Cobb requested by Justice Scalia, due June 12, 2000.
	Jun 7 2000	Response to application (99A1007) filed by Raymond Cobb.
	Jun 7 2000	Brief of respondent Raymond Cobb in opposition filed.
	Jun 9 2000	Application (99A1007) referred to the Court by Justice Scalia.
	Jun 9 2000	Application (99A1007) granted by the Court.
	Jun 12 2000	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Jun 14 2000	DISTRIBUTED for Conference of June 15, 2000
	Jun 19 2000	REDISTRIBUTED for Conference of June 22, 2000
	Jun 21 2000	Motion of National Association of Police Organizations, et al., for leave to file a brief as amici curiae filed.
	Jun 21 2000	Brief amici curiae of Ohio, et al. filed.
	Jun 22 2000	Motion of Texas District & County Attorneys Association, et al., for leave to file a brief as amici curiae filed.
	Jun 22 2000	Reply brief of petitioner Texas filed.
	Jun 26 2000	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jun 26 2000	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Jun 26 2000	Motion of National Association of Police Organizations, et al., for leave to file a brief as amici curiae GRANTED.
	Jun 26 2000	Motion of Texas District & County Attorneys Association, et al., for leave to file a brief as amici curiae GRANTED.
	Jun 26 2000	Petition GRANTED. limited to Questions 1 and 2 presented by the petition. SET FOR ARGUMENT January 16, 2001. **********
	Jul 3 2000	Motion of respondent for appointment of counsel filed.
	Jul 5 2000	DISTRIBUTED. September 25, 2000 (page 28)
	Jul 24 2000	Motion of the parties to dispense with printing of the joint appendix filed.
	Jul 25 2000	Order extending time to file petitioner's brief on the merits to and including August 24, 2000.

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No. 99-1702-CSY

Entry	Date	Proceedings and Orders
	Aug 23 2000	Brief amicus curiae of United States filed.
	Aug 24 2000	Brief of petitioner Texas filed.
	Aug 24 2000	Brief amici curiae of National Association of Police Organizations, et al. filed.
	Aug 24 2000	Brief amici curiae of Texas District & County Attorneys Association, et al. filed.
	Aug 24 2000	Brief amicus curiae of Ohio, et al. filed.
	Aug 24 2000	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Aug 28 2000	Motion of the parties to dispense with printing of the joint appendix GRANTED.
	Sep 5 2000	Order extending time to file respondent's brief on the merits to and including October 10, 2000.
	Sep 20 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 29 2000	Brief of respondent Raymond Cobb filed.
	Oct 2 2000	Motion for appointment of counsel GRANTED and it is ordered that Roy E. Greenwood, Esquire, of Austin, Texas, is appointed to serve as counsel for the respondent in this case.
	Oct 2 2000	Record filed.
	Oct 10 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Oct 30 2000	Reply brief of petitioner Texas filed.
	Nov 2 2000	CIRCULATED.
	Nov 3 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Nov 6 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 24 2000	This case is removed from the argument calendar for Wednesday, December 6, 2000. Oral argument is rescheduled for Tuesday, January 16, 2001.
	Jan 16 2001	ARGUED.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,
v.
RAYMOND LEVI COBB,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

III.

If the Court decides in *Dickerson v. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson*—which grafted *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1984), into the Sixth Amendment context—constitutionally require the result in this case?

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PETITION FOR WRIT OF CERTIORARI

The Texas Court of Criminal Appeals erroneously held that Respondent Raymond Cobb's voluntary confession was taken in violation of the Sixth Amendment right to counsel and reversed his capital murder conviction. The court's decision places it on one side of an irreconcilable conflict among numerous state and federal decisions regarding the ability of represented defendants to waive their Sixth Amendment right to counsel. The decision also wrongly applies an exception to this Court's Sixth Amendment jurisprudence that has been developed in the lower courts but never adopted by the Court. The Court should grant this petition to resolve these important, unsettled questions of federal constitutional law.

CITATION OF COURT OF CRIMINAL APPEALS'S OPINION

Raymond Levi Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000).

BASIS FOR JURISDICTION

The Texas Court of Criminal Appeals delivered its judgment and opinion in *Cobb* on March 15, 2000. This Court has jurisdiction to entertain the State's petition for writ of certiorari under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. CONST. amend VI.

STATEMENT OF THE CASE

Early in the morning of Monday, December 27, 1993, two days after Christmas, Lindsey Owings kissed his sleeping wife, Maggie, and his sleeping sixteen-month-old daughter, Kori Rae, goodbye and left for work. He never saw them again.

The day before, the Owings had met their neighbor, Raymond Cobb, who was living across the street with his sister and her boyfriend, when he knocked on their door looking for his dog. In the late morning or early afternoon of December 27, Cobb burglarized the Owings' home, stealing a VCR, a stereo, some Walt Disney videotapes, and a bottle of tequila. In the course of that burglary, Cobb stabbed Maggie to death and buried her and Kori Rae in a wooded area about a mile from the house. Kori Rae was alive when Cobb buried her, and she died soon after of suffocation.

Lindsey arrived home after work and found his wife and child missing. Aside from the few missing items, there were no signs of a struggle or foul play. He reported the burglary and the disappearances to the Walker County police. The police searched the surrounding area, canvassed the neighbors, and published fliers with photos of Maggie and Kori Rae, but no trace of them was found.

In February 1994 an anonymous tip led police to suspect Cobb in the burglary. Cobb initially denied involvement, but eventually admitted to Walker County detectives that he had burglarized the Owings' home on December 27, 1993. Cobb made a voluntary, written statement to that effect in July 1994, but steadfastly denied any involvement in the disappearances.

Based on his statement, Cobb was indicted for burglary of the Owings' home. In August 1994, an attorney, Hal Ridley, was

appointed to represent Cobb. App., at B-2.[1] Ridley's representation of Cobb was limited to the pending burglary charge. *Id.* Based on a conversation with Walker County District Attorney David Weeks, Ridley understood that Cobb was not yet a suspect in the disappearances, but that the police believed Cobb knew more than he was saying. App., at B-3. This was important to Ridley, because Ridley had recently been involved in a capital murder trial and "really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect." *Id.*

Over the next fourteen months, the Walker County detectives continued to investigate the disappearances of Maggie and Kori Rae. On two occasions, the detectives asked Ridley for permission to question Cobb about the disappearances. The first of these occasions was at Cobb's arraignment for burglary, shortly after Ridley was appointed. App., at B-5. When asked for permission to talk to Cobb, Ridley stated, "I gave my permission and told them that it wasn't necessary for me to be there." *Id.* The second occasion was in September 1995; Ridley again gave his permission for Cobb to be interrogated about the disappearances outside Ridley's presence. *Id.*, at B-5 to B-6.[2]

By November 1995 Cobb was out on bond on the burglary charge and had moved back to Odessa, Texas, where Cobb's father, Charles, lived. On November 11, 1995, Charles Cobb telephoned Walker County detective Judy James, the lead investigator on the case, and told her that Raymond had confessed to killing Maggie and Kori Rae during the burglary. James advised Charles to make

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1. A transcript of Ridley's suppression hearing testimony appears in the Appendix to this petition (App. B).

2. In fact, on this occasion, Cobb led investigators through a wooded area near the Owings' residence, retracing his steps during the burglary. A subsequent search of the area with cadaver dogs uncovered no evidence, however.

a statement to the Odessa police, and he did. The Odessa police faxed Charles's statement to James and she used it to obtain an arrest warrant for Raymond Cobb, which she then faxed back to Odessa. James did not inform the Odessa police that Cobb was represented by an attorney on the burglary charge.

By this time, Odessa detectives Vic Sikes and Harold Thomas had already ascertained Cobb's whereabouts—he was at a hospital with his girlfriend, Kandy, who was pregnant with Cobb's son and was experiencing labor pains. Around 2 a.m. on the morning of November 12, the detectives identified Cobb and Kandy as they emerged from the hospital (the labor had been false). They arrested Cobb, Mirandized him, and brought him to the police station. They telephoned James and informed her that they had Cobb in custody. When they asked her if they could question him, James agreed.

Detectives Sikes and Thomas brought Cobb to an interview room and Mirandized him again. Beginning around 3 a.m., Sikes questioned Cobb for approximately an hour, without success. After a five-minute break, Thomas took over the interrogation. Ascertaining that Cobb was a churchgoer, Thomas spoke to Cobb about his faith. This approach worked, and Cobb soon confessed to the murders. Both orally and thereafter in writing, Cobb explained that on December 27, 1993, he had entered the Owings' home and begun removing the stereo. Maggie Owings confronted him, and Cobb stabbed her in the stomach with a double-edged knife he was carrying. Cobb carried and dragged Maggie's body to a wooded area several hundred yards from the house. He then stated:

> "I went back to her house and I saw the baby laying in its bed. I took the baby out there and it was sleeping the whole time. I laid the baby on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and started digging a hole between

> them. After I got the hole dug the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then."

Afterwards, Cobb returned to the Owings' house and completed his theft of the stereo, VCR, videotapes, and the bottle of tequila. Cobb stated that he had been drinking beer and tequila and smoking marijuana that day and "had a pretty good buzz."

Cobb confessed just after 5 a.m. on the morning of November 12, 1995. He said that he thought he still had the murder weapon and consented to a search of his home in Odessa, accompanying Sikes and Thomas there around 6 a.m. Cobb was unable to find the knife, but he did retrieve a gold ring that he gave to the officers, saying, "This is the wedding band that I took off Margaret Owings when I killed her."

Around 9 a.m., Cobb was arraigned on capital murder charges in Odessa. Cobb was then flown, with Thomas and Sikes, to Walker County, where they were met by Walker County investigators and a justice of the peace. Cobb was arraigned again at the airport and then taken to the Owings' residence. He then led the police from the house to the wooded area where he had buried Maggie and Kori Rae. As crime technicians began to secure the grave, Cobb was taken to jail and booked. Not once, from the time Cobb was arrested through the time he showed police the burial site, did Cobb ever indicate that he wanted to speak to an attorney or that he was represented by an attorney on the burglary charge.

That evening, just near dark, the crime technicians found at the grave site clothing and bone fragments later determined to belong to Maggie Owings. They found Kori Rae's clothing, but no sign of her body. Later that evening, Walker Court District Attorney

Weeks telephoned Hal Ridley, Cobb's attorney on the burglary charge, and told him what had transpired.

Ridley met with Cobb in jail the next day, November 13, 1995. While there, Ridley talked with the Walker County investigators; regarding that conversation, Ridley testified:

> "In fact [Walker County detective] Judy [James] asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that, you know, that decision hadn't been made to my knowledge yet, but we talked a little bit." App., at B-10.

Either that evening or the following evening, investigators contacted Ridley and asked permission to bring Cobb back to the grave site.[3] The crime technicians had been unable to find any sign of Kori Rae's body and hoped that Cobb could provide assistance. Ridley agreed to let Cobb help, but Cobb was unable to lead the investigators to the child's remains.[4]

On the evening of the 14th, Ridley was summoned to jail to help Cobb cope with "emotional problems"—Cobb was apparently distressed because his son had been born that day. Ridley helped arrange a telephone call to Cobb's girlfriend, Kandy. App., at B-11.

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3. The suppression hearing testimony of Ridley and James seems inconsistent regarding the date that Cobb was brought back to the grave site after being booked. James testified that this occurred on the evening of November 13, but Ridley seemed to testify that it occurred on the evening of November 14 (App., at B-10). The inconsistency appears entirely inadvertent and, in any event, the date is irrelevant since it is undisputed that Ridley consented to the officers' request to bring Cobb back out to the grave.

4. Expert testimony during trial established the likelihood that Kori Rae's body was either entirely consumed by scavengers or that her immature bones simply disintegrated in the decomposition process.

Shortly after that, Ridley was appointed to represent Cobb on the murder charges:

> "A: . . . And ultimately, I was appointed to represent him, and after that I pretty much—well, after that I pretty much cut off the (sic) any more contact that he had with law enforcement.
>
> Q: To the best of your knowledge he has not had any further contact?
>
> A: Shouldn't have had after the 14th. If he did, it was without my permission." App., at B-11.

Before Cobb's capital murder trial began, the defense moved to suppress Cobb's confession as having been obtained in violation of, *inter alia*, the Sixth Amendment. After a hearing, the trial court denied the motion to suppress. *See* App. D. The jury found Cobb guilty of capital murder and Cobb was assessed the death penalty. *See* App., at E-12; App. F.

In a 6-3 decision, the Texas Court of Criminal Appeals reversed Cobb's conviction and remanded for a new trial. *See Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc) (App. A). The court found that Cobb's Sixth Amendment right to counsel, which had attached when Cobb was indicted for burglary, also attached to the murder investigation, because the two offenses were "factually interwoven." App., at A-7. The court also determined that Cobb had "asserted" his Sixth Amendment right to counsel "by accepting Ridley's appointment as his counsel." *Id.* These facts, the court reasoned, implicated the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), and rendered presumptively involuntary Cobb's unilateral waiver of his right to counsel during the November 12, 1995 interrogation. A vigorous dissent from Judges McCormick, Keller, and Keasler would have found that: (1) *Michigan v. Jackson* did not apply to these facts and that Cobb had validly waived his Sixth Amendment right to counsel

under *Brewer v. Williams*, 430 U.S. 387 (1977), and made a voluntary confession, and (2) in any event, under *McNeil v. Wisconsin*, 501 U.S. 171 (1991), Cobb's Sixth Amendment right to counsel had not attached with regard to the capital murder offense at the time he confessed. App., at A-25 & n.20.

SUMMARY OF ARGUMENT

In suppressing Cobb's confession to the murders, the Court of Criminal Appeals committed two errors, each implicating an important and unsettled question of Sixth Amendment law on which numerous state and federal courts disagree. First, the court misconstrued this Court's decisions in *Michigan v. Jackson, supra,* and *Patterson v. Illinois*, 487 U.S. 285 (1988), by ruling that Cobb's mere acceptance of appointed counsel qualified as an "assertion" of his right to counsel. Second, by ruling that Cobb's right to counsel had attached to the as-yet-uncharged murder offenses, the court both violated this Court's offense specific rule in *McNeil v. Wisconsin, supra,* and also misapplied the "inextricably intertwined" exception to that rule that has developed in the state and federal courts, but has never been adopted by the Court.

The court's erroneous decision in *Cobb* implicates two aspects of this Court's certiorari jurisdiction. The decision conflicts with decisions of other state courts of last resort and one United States court of appeals; it also decides an important question of federal constitutional law that has not been, but should be, settled by this Court. *See* SUP. CT. R. 10(b), (c).

ARGUMENT

I. THE COURT OF CRIMINAL APPEALS'S DECISION IMPLICATES AN IMPORTANT AND UNSETTLED QUESTION REGARDING THE APPLICATION OF *MICHIGAN V. JACKSON* AND *PATTERSON V. ILLINOIS*.

The Court of Criminal Appeals reversed Cobb's conviction because it erroneously believed that his mere acceptance of appointed counsel in the burglary case barred Cobb's waiver of his right to counsel prior to his murder confession. In so holding, the court reiterated its expansive view of *Jackson* and placed itself irreconcilably in conflict with the majority of courts to decide the issue, which require some affirmative assertion of the right to counsel to invoke *Jackson*'s prophylactic rule. *Compare Raymond Levi Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000), *Bradford v. State*, 927 S.W.2d 329, 333-34 (Ark. 1996), *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989), *and Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989), *with Montoya v. Collins*, 955 F.2d 279, 283 (CA5 1992), *Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998), *Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999), *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997), *State v. Carter*, 664 So.2d 367, 370 (La. 1995), *and People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994). The conflict is best understood in light of *Jackson* and the Court's subsequent Sixth Amendment jurisprudence.

A. *Jackson* and Its Progeny Do Not Support the Court of Criminal Appeals's Decision in this Case.

In *Michigan v. Jackson*, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 474 U.S. 625, 636 (1986). The Court in *Jackson* imported into Sixth Amendment jurisprudence the "prophylactic"

rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1984), which provides, in the Fifth Amendment context, that once an accused in custody expresses his desire to deal with police only through counsel, the accused is no longer subject to further police-initiated interrogation until he is provided with counsel. *See Jackson*, 474 U.S., at 626. In *Jackson*, two defendants had requested appointed counsel at arraignment, but before they consulted with counsel, the police initiated questioning, secured written waivers of their right to counsel, and obtained their confessions. *Id.*, at 627-28. Applying *Edwards*, the Court held that the written waivers were presumptively ineffective to waive the defendants' previously invoked Sixth Amendment right to counsel. *Id.*, at 635.

Long before *Jackson*, the Court delineated the pretrial contours of an accused's Sixth Amendment right to counsel. In *Kirby v. Illinois*, the Court held that the right attaches upon the "initiation of judicial criminal proceedings." 406 U.S. 682, 689 (1972). The right, however, only protects defendants at post-attachment proceedings deemed "critical stages." *See, e.g., United States v. Wade*, 388 U.S. 218, 224 (1967). Pretrial proceedings are critical when "the results might well settle the accused's fate and reduce the trial to a mere formality." *Id.; see also United States v. Gouveia*, 467 U.S. 180, 189 (1984). The Court has often recognized that police interrogation, occurring after attachment of the Sixth Amendment right to counsel, is a critical stage at which an accused is entitled to the assistance of counsel. *See, e.g., Jackson*, 475 U.S., at 629-30; *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

Equally clear from the Court's Sixth Amendment cases is the general proposition that an accused may waive the benefits of his right to counsel, if he does so knowingly, intelligently, and voluntarily. In *Brewer v. Williams*, for example, the police elicited statements from a previously arraigned defendant during a long automobile trip; the defendant had already consulted with two

lawyers, and the police, knowing this, had agreed not to question him during the trip. 430 U.S., at 391-93. The Court concluded that the defendant had been denied the assistance of counsel during this post-attachment interrogation and that his mere responses to the officers' subtle questioning did not establish an "intentional relinquishment or abandonment" of his right to counsel. *Id.*, at 404-05 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Although the Court did not find a waiver in *Brewer*, its opinion was founded on the bedrock proposition that a post-attachment waiver of the Sixth Amendment right to counsel is possible. *See, e.g., Brewer*, 430 U.S., at 403-04 (agreeing with lower courts about "the proper standard to be applied in determining the question of waiver"). The Court took pains to clarify the scope of its holding:

> "The Court of Appeals did not hold, nor do we, that under the circumstances Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." *Id.*, at 405-06 (footnote omitted).

This real possibility of post-attachment waiver has been consistently reaffirmed by the Court.[5]

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5. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 428 (1986) ("It is clear that, absent a valid waiver, the defendant has the right to the presence of an attorney during [post-attachment interrogation]."); *Jackson*, 475 U.S., at 630 (posing question as "whether respondents validly waived their right to counsel at the postarraignment custodial interrogations"); *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (addressing whether unrepresented defendant made a "'knowing and intelligent' waiver of his Sixth Amendment right" (citing *Brewer*, 430 U.S., at 401, 404)); *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) ("[N]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney.").

Having developed the concepts of "attachment" and "waiver" in the Sixth Amendment context, the Court in *Jackson* introduced an additional strand—the effect of an accused's "assertion" of his right to counsel. As discussed above, *Jackson* grafted the *Edwards* prophylactic rule onto the Sixth Amendment, rendering presumptively invalid an accused's unilateral waiver of the right to counsel if the accused has already invoked that right. *Jackson*, 475 U.S., at 636. The unmistakable premise of *Jackson* is that mere attachment of the Sixth Amendment is not enough to trigger the *Edwards* rule; rather, the accused must make some positive "assertion" or "invocation" to enjoy the prophylactic benefits of *Edwards*. *See Jackson*, 475 U.S., at 626 (framing question as whether *Edwards* applies to a formally charged defendant "who has requested appointment of counsel at his arraignment"); *id.*, at 636 (holding unilateral waiver invalid "after a defendant's assertion, at an arraignment or similar proceeding, of [defendant's] right to counsel"); *id.*, at 635 (observing that written waivers cannot justify police-initiated interrogations "after the request for counsel in a Sixth Amendment analysis"); *id.*, at 631 (discussing "reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer").

Although disagreeing with applying *Edwards* in the Sixth Amendment context, the dissenting Justices in *Jackson* carefully noted the limits of the majority's holding:

> "[T]he Court most assuredly does not hold that the *Edwards* per se rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. Such a holding would represent, after all, a shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society. Applying the *Edwards* rule to situations in which a defendant has not made an explicit request for counsel would also render completely nugatory the extensive discussion of "waiver" in such prior Sixth Amendment cases as *Brewer v. Williams*, 430 U.S. 387, 401-406, 97 S.Ct. 1232, 1241-1243, 51 L.Ed.2d 424 (1977)." *Jackson*, 475 U.S., at 640 (Rehnquist, J., dissenting, joined by Powell & O'Connor, JJ.).

The Court's subsequent Sixth Amendment cases have demonstrated that *Jackson* was not, as Justice Rehnquist admonished, the "shockingly dramatic restructuring" of the Court's prior waiver jurisprudence. In *Patterson v. Illinois*, for example, the Court held that *Jackson* did not apply to an accused's postindictment interviews with police, because the accused "at no time sought to exercise his right to have counsel present." 487 U.S. 285, 290 (1988). The Court observed that its holding in *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with police," and that the accused in *Patterson* could have put an end to questioning by "indicat[ing] that he wanted the assistance of counsel." *Id.*, at 291 (quoting *Jackson*, 475 U.S., at 631). Language in the Court's cases following *Patterson* has confirmed that view of *Jackson*.[6]

The Court's Sixth Amendment jurisprudence in this area is not seamless, however. *Patterson* dealt with a situation in which the right to counsel had attached, but the accused had not requested a lawyer and had not, in fact, consulted with a lawyer. In *Patterson*, the Court appended the following cryptic footnote to its discussion:

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6. *See, e.g., Harvey*, 494 U.S., at 352 (observing that *Jackson* changes the waiver analysis "once a defendant obtains, or even requests counsel"); *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991) (stating that *Jackson* applies "after the Sixth Amendment right to counsel attaches and is invoked").

> "We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney client relationship takes effect. *See Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 487-88, 88 L.Ed.2d 481 (1985). . . . Indeed, the analysis changes markedly once an accused even requests the assistance of counsel. *See Michigan v. Jackson, supra*." *Patterson*, 487 U.S., at 290 n.3.

The Court did not make clear what "distinct set of constitutional safeguards" it was referring to. *Id.* The portion of *Moulton* the Court cited stands for the unremarkable proposition that the state violates the Sixth Amendment by obtaining incriminating statements from an accused through surreptitious, post-indictment interrogation by a police informant. *See Moulton*, 474 U.S., at 176. *Patterson*'s footnote three is particularly confusing in light of the Court's unequivocal statement two years later in *Michigan v. Harvey*, that "nothing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." 494 U.S. 344, 352 (1990) (emphasis added).

B. The Lower Courts Are Split on the Proper Interpretation of *Jackson*.

That footnote three evidences an ambiguity in the Court's Sixth Amendment jurisprudence is clear from the widespread disagreement among state and federal courts about the proper application of *Jackson* and *Patterson*. Specifically, the courts disagree about whether an accused may unilaterally waive his Sixth Amendment right to counsel when he has been appointed counsel, and may in fact have consulted with counsel, but when he has made no "assertion" within the meaning of *Jackson* of his desire to deal

with the police only through counsel. There is a widespread and irreconcilable conflict in state and federal courts about this question of federal constitutional law, and the Court should grant this petition to resolve this important constitutional issue.

The leading cases holding that a represented defendant cannot unilaterally waive his right to counsel, even when he has not previously asserted that right, are *Dew v. United States*, 558 A.2d 1112 (D.C. 1989), and *Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989). In *Dew*, the accused was indicted for robbery and was appointed counsel; when he failed to appear for arraignment, he was arrested and Mirandized, and he subsequently gave an incriminating statement. 558 A.2d, at 1114. Based on its reading of *Moulton* and footnote three in *Patterson*, the District of Columbia Court of Appeals held that "appointment of counsel" is equivalent to the "request for counsel" necessary to trigger *Jackson*. *Dew*, 558 A.2d, at 1116. In a footnote, the court observed that "[t]he record is clear that [the accused] did not affirmatively request counsel within the meaning of *Michigan v. Jackson*." *Id.* (citations omitted). *See generally* 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE ("LAFAVE") §6.4(f), at 495 & n.110, 497 & n.123 (2d ed. 1999).[7]

In *Holloway*, the Texas Court of Criminal Appeals reached the same result as *Dew*, albeit through somewhat different reasoning. The defendant in *Holloway* was indicted for capital murder and an attorney was appointed to represent him. 780 S.W.2d, at 788-89.

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7. The Arkansas Supreme Court followed *Dew*'s reasoning in *Bradford v. State*, 927 S.W.2d 329, 333-34 (Ark. 1996). In *Bradford*, the court held that appointment of counsel was equivalent to a request for counsel under *Jackson*, even though neither the accused nor the interrogating police were aware of the appointment. *Id.* It is passing strange that a defendant who is unaware that counsel has been appointed can to be said have "invoked" his right to counsel under *Jackson*.

The attorney first attempted, unsuccessfully, to refuse the appointment, but soon after met with the defendant and advised him not to submit to questioning. *Id.*, at 789. When police later initiated questioning, the defendant waived his right to counsel and gave incriminating statements. *Id.* The Court of Criminal Appeals initially held that police had not violated the defendant's Sixth Amendment right to counsel,[8] but this Court vacated and remanded for consideration in light of *Jackson* and *Moran v. Burbine*, 475 U.S. 412 (1986). *Holloway*, 780 S.W.2d, at 788.

On remand, the Court of Criminal Appeals reversed itself and found that the defendant's Sixth Amendment rights had been violated. *Id.*, at 789. Surprisingly, the first part of the court's analysis concluded that, because the defendant never requested counsel, *Jackson* did not apply. *Id.*, at 789-90 ("*Jackson*'s ban on police-initiated interrogation . . . was based not on the mere existence of the right to counsel but upon the accused's actual invocation of that right."). Nevertheless, the court reasoned in the second part of its analysis that, because the defendant was in fact represented by counsel and had developed a "relationship" with counsel, the defendant could not thereafter unilaterally waive his right to counsel. *Id.*, at 795. The court relied heavily on *Patterson*'s footnote three and interpreted *Patterson*'s "distinct set of constitutional safeguards" as prohibiting unilateral waiver when an accused has consulted with an attorney, despite the fact that the defendant had never "asserted" his right to counsel under *Jackson*. *See id.*, at 791, 794. Functionally, then, *Holloway* mirrors the conclusion of the *Dew* court that appointment of counsel equals a "request for counsel" under *Jackson*, *see Dew*, 558 A.2d, at 1116, as the Court of Criminal Appeals made clear in this case.

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8. *See Holloway v. State*, 691 S.W.2d 608, 614-15 (Tex. Crim. App. 1984).

The leading cases in conflict with *Dew* and *Holloway* are *Montoya v. Collins*, 955 F.2d 279 (CA5 1992), and *State v. Carter*, 664 So.2d 367 (La. 1995). These cases, and those that follow them, stand for the proposition that an accused whose Sixth Amendment rights have attached and who has been appointed counsel must nevertheless make "an actual, positive statement or affirmation of the right to counsel" in order to enjoy the prophylactic benefits of *Jackson* and its progeny. *Montoya*, 955 F.2d, at 282. *Montoya* and *Carter* stand in direct, irreconcilable conflict with the rule set forth in *Dew* and *Holloway* that an accused who has been appointed counsel cannot unilaterally waive his right to counsel, regardless of whether he has expressly invoked the right.

In *Montoya*, the defendant did not request appointed counsel when arraigned on capital murder charges. 955 F.2d, at 282. Because of the nature of the charges, however, the magistrate appointed counsel to represent the defendant. *Id.*, at 282-83. When the police subsequently initiated questioning, the defendant waived his rights and confessed. *Id.*, at 282. The Fifth Circuit held that defendant's waiver was not presumptively invalid, because he had not effectively asserted his right to counsel under *Jackson*:

> "For purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Id.*, at 283 (quoting *Jackson*, 475 U.S., at 626).

Significantly, the court explained that the oft-cited language in footnote three of *Patterson* refers only to the attachment of the substantive Sixth Amendment safeguards surrounding the attorney-client relationship, and *not* to the question of what constitutes an acceptance or invocation of the right to counsel. *Montoya*, 955 F.2d, at 283 (construing *Patterson*, 487 U.S., at 290 n.3). *Patterson*, explained the court, reaffirmed that "*Jackson* applies when a defendant has indicated he wanted the assistance of

counsel." *Montoya*, 955 F.2d, at 283 (quotations omitted). *See generally* LAFAVE, §6.4(f), at 497 & n.123.[9]

In *State v. Carter*, the Louisiana Supreme Court followed *Montoya* and held that a defendant who had not asserted or invoked his right to counsel could validly waive that right, even though he had already been appointed counsel at his initial appearance. 664 So.2d, at 370. After an exhaustive survey of this Court's Sixth Amendment cases, *Carter* concluded that "the Supreme Court has not erected a per se barrier against the validity of waivers made in response to interrogation, *even where a defendant is represented by counsel*." *Id.*, at 377 (emphasis added) (citing *Harvey*, 494 U.S., at 352-53). Examining *Jackson* and *Patterson* in light of *Brewer*, the court also found that "the mere fact of appointment of counsel" does not alone preclude subsequent interrogation. *Carter*, 664 So.2d, at 380.[10] The court explicitly disagreed with the decisions in *Dew* and *Holloway*. *Id.*, at 380 n.12.[11]

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9. The Fifth Circuit has applied *Montoya* to the situation where an indicted defendant waived his right to counsel and made incriminating statements, even though unaware that counsel had been appointed to represent him. *Wilcher v. Hargett*, 978 F.2d 872, 874, 876 (CA5 1992); *see also West v. Johnson*, 92 F.3d 1385, 1403-04 (CA5 1996) (following *Montoya*).

10. Other state supreme courts have followed this reading of *Jackson* and *Patterson*. *See Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999); *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997); *People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994). The District Court for the Western District of Kentucky has adopted *Montoya*'s reasoning. *See Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998).

11. *See generally* Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule,"* 1998 U. Ill. L. Rev. 1207, 1230-37 (1998) (noting conflict among *Montoya*, *Carter*, *Dew*, and *Holloway*).

This Court has observed that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991). But the disagreement among state and federal courts regarding the application of this Court's Sixth Amendment jurisprudence weakens the likelihood of law enforcement realizing this "unmitigated good." As exemplified by *Dew* and *Holloway* on one side, and *Montoya* and *Carter* on the other, courts fundamentally disagree about the scope of the *Jackson* prophylactic rule. The consequences of this disagreement are critical: an overly expansive application of *Jackson* will result in the unwarranted suppression of voluntary confessions that are perfectly valid under *Brewer*. This Court has established that *Jackson* applies only when an accused has affirmatively demonstrated that he desires the buffer of counsel between himself and the criminal judicial mechanism of the state. Applying *Jackson* outside that context—when its protections are not actively sought—will contribute nothing towards "[p]reserving the integrity of an accused's choice to communicate with police only through counsel." *Patterson*, 487 U.S., at 291.

The Texas Court of Criminal Appeals's erroneous decision to suppress Cobb's uncoerced confession in the case at bar conflicts with *Jackson*, *Patterson*, *Montoya*, and *Carter*, and perfectly demonstrates the unjustified costs of misapplying *Jackson*. With no citation to authority, the court simply ruled that "once [Cobb's] right to counsel attached, he asserted it by accepting Ridley's appointment as his counsel." App., at A-7. By echoing the language in *Patterson*'s footnote three (". . . petitioner had not retained, or *accepted by appointment*, a lawyer . . ."), *Cobb* perpetuated the error condemned by *Montoya* and *Carter*: mere acceptance of appointed counsel does not suffice to trigger *Jackson*, because such conduct by the accused does not affirmatively demonstrate a desire to deal with the police only through counsel.

The court's own prior decision in *Holloway*, as well as the parallel reasoning in *Dew*, dictated *Cobb*'s erroneous result.[12]

The court did not and could not point to a single instance in the record where Cobb affirmatively expressed a desire to interpose an attorney between himself and the state judicial process. The court emphasized that the police twice asked Ridley's "permission" to talk to Cobb. App., at A-7. Yet the court cited no authority (because there is none) for the proposition that Ridley could assert his client's Sixth Amendment rights on his behalf. Furthermore, Ridley's undisputed testimony at the suppression hearing indicates that at no time did he ever object to the police questioning Cobb—indeed, Ridley's consistent position was to leave any objections to questioning about the disappearances up to *his client*. App., at B-6. There is no evidence that his client ever objected to the questioning or asserted his right to deal with the police only through counsel. All the evidence is, in fact, to the contrary: wracked with remorse for what he had done, Cobb voluntarily detailed his gruesome acts and voluntarily led the police to Maggie and Kori Rae's grave.

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12. Ironically, the author of *Holloway*, Judge McCormick, disavowed *Holloway* in his dissent in *Cobb*. App., at A-23 to A-25. McCormick criticized his opinion in *Holloway* for failing to address *Brewer* and for relying on footnote three in *Patterson*. *Id*. Consequently, McCormick would have declined to follow *Holloway* and would have decided that Cobb's confession was voluntary under *Brewer*. App., at A-25. To the extent that *Jackson* dictated a contrary result based on Cobb's "acceptance" of appointed counsel, McCormick would have declined to follow *Jackson*, citing *United States v. Dickerson*, 166 F.3d 667, 672 (CA4), *cert. granted*,120 S.Ct. 578 (Dec. 6, 1999). App., at A-25.

C. *Dickerson* May Provide an Additional Reason to Grant the Petition.

As Judge McCormick observed in his *Cobb* dissent, the Court has granted a writ of certiorari and heard argument in *United States v. Dickerson* to decide whether Congress validly modifies the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). App., at A-20 n.9; *United States v. Dickerson*, 166 F.3d 667, 672 (CA 4), *cert. granted*, 120 S.Ct. 578 (1999). A decision by the Court that *Miranda* did not embody a requirement of constitutional law—and was therefore effectively modified by 18 U.S.C. §3501—would draw both *Edwards* and *Jackson* into serious question: *Edwards* applies a prophylactic rule designed to safeguard the protections of *Miranda* in the Fifth Amendment context, and *Jackson* applies *Edwards* in the Sixth Amendment context. *See Edwards*, 451 U.S., at 481-85; *Jackson*, 475 U.S., at 626. Should the Court in *Dickerson* find that *Miranda* is not a constitutionally mandated rule, the Court should grant this petition to decide whether *Edwards* and *Jackson* have continuing validity and whether, in light of *Dickerson*, *Jackson* dictated the Court of Criminal Appeals's decision in *Cobb*.

II. The Court of Criminal Appeals's Decision Implicates an Important and Unsettled Question Regarding the Attachment of the Sixth Amendment Right to Counsel to Factually Related Offenses.

Cobb implicates an additional, independent issue of federal constitutional law that invites this Court's attention. Relying on its own decisions in *State v. Frye*, 897 S.W.2d 324, 328-29 (Tex. Crim. App. 1995), and *Upton v. State*, 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993), as well as on the decision of the Third Circuit in *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997), the court held that Cobb's Sixth Amendment right to counsel attached to the as-yet-uncharged capital murder offense, because it was "very closely related factually" to the previously charged burglary

offense. App., at A-6. This decision implicates the "inextricably intertwined" test that state and federal courts have developed as an exception to the "offense specific" nature of the Sixth Amendment right to counsel. *See McNeil*, 501 U.S., at 175-76. The Court, not having addressed the "inextricably intertwined" test, should take this opportunity to clarify its parameters. *Cobb* presents the right opportunity because the Court of Criminal Appeals has applied the test in such a way that frustrates the ability of law enforcement to investigate related but uncharged crimes, while in no way furthering an accused's Sixth Amendment protections.

Relying on *Moulton*, the Court in *McNeil* held that the Sixth Amendment right to counsel, in contrast to its Fifth Amendment counterpart, is "offense specific." *McNeil*, 501 U.S., at 175. Consequently, once the right has been invoked, the police are prohibited from initiating interrogation outside the presence of counsel "regarding the charge at issue." *Id.*, at 179 (citing *Jackson*, 475 U.S., at 632-33). Questioning about uncharged offenses, "to which the Sixth Amendment right has not attached," does not fall within this prohibition. *Id.*, at 176 (quoting *Moulton*, 474 U.S., at 179-80).

Moulton does, however, suggest that the Sixth Amendment may attach to certain offenses that are uncharged but factually related to the charged offense. In that case, the defendant had been indicted for theft by receiving, arising from his possession of a variety of automobiles and automobile parts. *Moulton*, 474 U.S., at 162. Wishing to investigate the defendant's apparent plan to murder a witness in that case, the police used an informant to surreptitiously record the defendant's conversations. *Id.*, at 164-66. In that process, however, the police obtained more detailed incriminating information regarding the pending theft charges, leading them to reindict the defendant. *Id.*, at 167. The new indictments realleged the pending charges, but added a burglary charge; the defendant was convicted of both theft and burglary. *Id.*

Moulton held that the police had violated the defendant's Sixth Amendment right to counsel by surreptitiously eliciting incriminating statements pertaining to the pending theft charges. *Id.*, at 179-80. The Court therefore ruled his statements inadmissible at the trial of the burglary and theft charges and vacated the defendant's convictions on those charges. *Id.* The Court recognized, however, that the police "have an interest in investigating new or additional crimes"; therefore, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Id.*, at 489 & n.16.

Relying primarily on *Moulton*,[13] state and federal courts have developed two related exceptions to the *McNeil* rule of "offense specific" Sixth Amendment attachment. The first exists when the uncharged offense is "inextricably intertwined" with the charged offense such that they "arose from the same predicate facts, conduct, intent and circumstances." *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997); *see United States v. Covarrubias*, 179 F.3d 1219, 1223-24 (CA9 1999); *United States v. Melgar*, 139 F.3d 1005, 1013 (CA4 1998); *United States v. Doherty*, 126 F.3d 769, 776 (CA6 1997); *United States v. Williams*, 993 F.2d 451, 457 (CA5 1993); *In re Pack*, 420 Pa. Super. 347, 356-57, 616 A.2d 1006, 1010-11 (1992); *United States v. Cooper*, 949 F.2d 737, 743-44 (CA5 1991); *People v. Clankie*, 530 N.E.2d 448, 451-52 (Ill. 1988). *See generally Commonwealth v. Rainwater*, 425 Mass.

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13. Courts have also recognized that this principle in *Moulton* was an implicit part of the Court's decision eight years before in *Brewer*. *See, e.g., People v. Clankie*, 530 N.E.2d 448, 451 (Ill. 1988). In *Brewer*, the defendant had been indicted for abduction; the Court held that the police violated his right to counsel by deliberately eliciting incriminating statements pertaining to his murder of the abduction victim. 430 U.S., at 404-05.

540, 681 N.E.2d 1218 (1997) (collecting state and federal cases); *Whittlesey v. State*, 665 A.2d 223, 233-36 (Md. 1995) (same); LAFAVE, §6.4(e), at 490-92 & n.92, 498 & n.127.

The second exception applies when there is evidence that the police have deliberately sought to circumvent an accused's Sixth Amendment right to counsel. *See Covarrubias*, 179 F.3d at 1223 & n.6; *United States v. Martinez*, 972 F.2d 1100, 1105 (CA9 1992); *United States v. Hines*, 963 F.2d 255, 258 (CA9 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339,1342-43 (CA10 1991). *See generally Whittlesey*, 665 A.2d at 234-35 (collecting cases). Such governmental conduct has been seen to violate the government's "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Hines*, 963 F.2d at 258 (quoting *Moulton*, 474 U.S., at 171).

An unsettled question regarding these exceptions to *McNeil* is the nature and degree of relatedness required between two offenses—one charged, the other uncharged—before the Sixth Amendment will attach to both. As the Sixth Circuit observed in *Doherty*:

> "The question of how 'inextricably intertwined' two offenses must be so that the Sixth Amendment right to counsel attaches simultaneously with respect to both offenses is open to some doubt, and we leave consideration of that question to another day." 126 F.3d, at 776.

The Court of Appeals of Maryland has observed that courts appear to interpret the "inextricably intertwined" or "closely related" exception more broadly when there is evidence of deliberate police misconduct, suggesting an analytical relationship between the two exceptions. *See Whittlesey*, 665 A.2d, at 234-35. Indeed, the Maryland court questioned whether the "inextricably intertwined" doctrine "is in fact compelled by Supreme Court precedent," but

declined to resolve the question. *Id.*, at 233-34 & n.8. *But see Melgar*, 139 F.3d, at 1013 & n.1 (identifying implicit "closely related" rule in *Moulton*).

A brief summary of some of the exemplary cases will illustrate the evolving nature of the "inextricably intertwined" exception. The seminal case is *People v. Clankie*, 530 N.E.2d 448 (Ill. 1988), in which the Supreme Court of Illinois interpreted *Brewer* and *Moulton* as standing for the proposition that the "[S]ixth [A]mendment rights of one formally charged with an offense extend to offenses closely related to that offense and for which a defendant is subsequently formally accused." *Clankie*, 530 N.E.2d, at 452. The court noted that this Court "has not yet explained just how closely related the two offenses . . . must be for the rule to apply." *Id.* The *Clankie* court, however, explicitly declined to delineate those parameters. *Id.* This was not necessary, the court observed, because in *Clankie* the subsequently charged offense involved precisely the same criminal conduct as the previously charged offense. *Id.*

Two more recent circuit cases, in an attempt to synthesize earlier case law, have developed complex, multi-factor versions of the "inextricably intertwined" exception. In *Melgar*, the Fourth Circuit stated that, to fall within the exception, "the offense being investigated must derive from the same factual predicate as the charged offense." 139 F.3d 1005, 1014 (CA4 1998) (quoting *United States v. Kidd*, 12 F.3d 30, 32 (CA4 1993)). Application of this test involves a consideration of whether the old and new charges "involve the same time, place and conduct." *Melgar*, 139 F.3d, at 1014-15. The court carefully noted, however, that a coincidence of "time, place and conduct" is not alone sufficient to invoke the exception: a defendant "must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses." *Id.*, at 1015. In this context,

the court construed "incriminating" evidence to include "any evidence damaging to the defendant's case." *Id.*[14]

In *Covarrubias*, the Ninth Circuit further elaborated upon the exception. 179 F.3d 1219 (CA9 1999). From *Brewer* and *Moulton*, the court gleaned the "indisputable implication" that "the right to counsel may attach to other offenses as long as there is a close enough relationship to the conduct that formed the basis for the initially charged crime." *Id.*, at 1224. Generally, the court advocated "an examination and comparison of all of the facts and circumstances relating to the conduct involved," considering in particular (1) the identity of the persons involved (including the victim, if any), and (2) the timing, motive, and location of the crimes. *Id.*, at 1225. In *Covarrubias*, the initially charged offense was a state kidnapping charge; the subsequently charged offense was the federal crime of transporting illegal immigrants. *Id.*, at 1221-22. In applying its test to the two offenses (and finding them "closely related" for Sixth Amendment attachment purposes), the court stressed that they "involved a continuous course of conduct" and that the federal charge was a "continuing offense." *Id.*, at 1225-26.[15]

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14. The "incriminating evidence" prong of the *Melgar* test is reminiscent of the test applied in *In re Pack*, in which the Superior Court of Pennsylvania found that the improperly elicited statement "tended to prove" both the subsequently charged and the previously charged offenses. *In re Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011; *see Whittlesey*, 665 A.2d, at 235 (citing *Pack*, and observing that "[a]nother test employed by at least one court is whether the statements elicited by the police constituted evidence of both offenses").

15. In *Whittlesey*, the Maryland Court of Appeals surveyed the application by state and federal courts of the "inextricably intertwined" exception. *See* 665 A.2d, at 235. The *Whittlesey* court noted the variety of factors applied by the courts, including: (1) whether new charges arise from "the same acts on which the [pending] charges were based"; (2) whether there is an "identity of time, place, and conduct"; (3) whether there is an "identity of prosecuting sovereign"; and (4) "whether the statements elicited by the police constitute evidence of both offenses." *Id.* (citations omitted).

This Court should clarify the parameters of the "inextricably intertwined" exception to *McNeil*. The Court's decisions in *Brewer*, *Moulton*, and *McNeil* leave open the question of what relationship must exist between charged and uncharged offenses before the panoply of Sixth Amendment protections will attach to both. Clarity in this area is essential because, as the Court observed in *Moulton*,

> "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached, simply because other charges were pending at the time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." 474 U.S., at 180.

Nowhere is that concern more apparent than in a case like *Cobb*, where the majority's inappropriate application of the "inextricably intertwined" test resulted in the suppression of an otherwise valid confession without furthering any Sixth Amendment interest. Any extension of the Sixth Amendment beyond the charged offense is intended to protect the defendant's invoked right to counsel as to the charged offense. But it cannot be disputed that the police in this case were not attempting to gather additional evidence relating to the burglary charge, to which Cobb had already confessed.

The facts of *Cobb* do not implicate the "inextricably intertwined" exception as developed in the lower courts. Specifically, while there was a similarity of "time" and "place" in Cobb's conduct that resulted in both burglary and murder, the murder charge, as prosecuted, was based on criminal acts distinct from the burglary. *See, e.g., Cooper*, 949 F.2d, at 744 (declining to

apply exception to two offenses involving "different conduct"). Additionally, the interrogation of Cobb that resulted in his confession to the murders could not possibly have produced evidence incriminating him on the burglary charge—Cobb, after all, had already confessed to the burglary. *See, e.g., Melgar*, 139 F.3d, at 1015 (applying "incriminating evidence" prong of exception); *Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011 (applying "evidence of both offenses" test). Furthermore, the two offenses did not share an "identity of persons." *See, e.g., Covarrubias*, 179 F.3d, at 1225 (considering the "identity of the persons involved"). The focus of Cobb's burglary was the Owings' property, while the focus of his murders was the Owings themselves. Moreover, by its very nature burglary is not a "continuing offense." *See id.*, at 1225-26 (considering the "continuing nature" of the offense). The offense was completed the moment Cobb entered the Owings home with the intent to commit a theft. TEX. PENAL CODE §30.02(a)(1); *see Garcia v. State*, 571 S.W.2d 896, 899 (Tex. Crim. App.1978) (offense of burglary complete upon entering habitation with intent to commit felony or theft).

Most fundamentally, however, Cobb was convicted of capital murder based—*not* on burglary as a predicate felony—but rather on multiple murders committed in the same transaction. *See* App., at C-1, D-4 ¶13, E-4. Thus, even if Cobb had previously "asserted" his right to counsel in response to the burglary charge,[16] no statements thereafter made by Cobb were ever used against him *with respect to burglary*, but only with respect to murder. Because of the legal basis for Cobb's capital murder conviction, the burglary and the murders were legally and factually distinct. *Cf. Moulton*, 474 U.S., at 167 (improperly elicited statements used to convict defendant on *both* the subsequently charged burglary *and* the previously charged theft). The lower courts do not appear to have

16. Part I, *supra*, shows that he did not, however.

developed this aspect of the "inextricably intertwined" exception.[17] This Court should address it in this case.

Finally, the policy justification behind the "inextricably intertwined" exception cannot support the result in *Cobb*. Courts have applied the exception for one overriding purpose: to prevent the government from "circumvent[ing] the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes." *See Arnold*, 106 F.3d, at 41 (quoting *In re Pack*, 420 Pa. Super., at 356, 616 A.2d, at 1011). There is no suggestion here that the police plotted to circumvent Cobb's right to counsel by charging him with "additional related crimes." Undisputedly, Cobb had already confessed to the burglary when new evidence—his father's testimony—came to light. It was this new evidence, and not some malevolent design of the police to deny Cobb his right to counsel, that led to his arrest for the murders. What makes this even plainer is that the murders and the burglary, while fortuitously linked by time and place, were legally distinct: burglary was not

17. Indeed, the only decision on this issue appears to be from the Texas Court of Criminal Appeals in *Upton*, a case relied upon by the majority in *Cobb*. App., at A-6. In *Upton*, the defendant had been indicted for theft and burglary; the police then obtained incriminating statements from the defendant about a murder arising from the same factual scenario as the pending charges. 853 S.W.2d, at 554. The prosecution charged the defendant with capital murder, the aggravating element being that he committed the murder in the course of the previously charged robbery. *Id.*, at 555. In ruling that the defendant's right to counsel had been violated, the court reasoned that, when the police questioned the defendant about the murders, they were not investigating "new or additional crimes" under *Moulton* because "adversarial proceedings had begun against [the defendant] on at least one important element of the offense for which he was later charged." *Id.*, at 555-56.

the predicate felony for Cobb's capital murder conviction and the elements of the two crimes did not overlap.

Cobb committed burglary by entering the Owings' home with the intent to steal their property. Soon after that, Cobb cruelly and brutally murdered Maggie and Kori Rae Owings. Under the Court of Criminal Appeals's application of the "inextricably intertwined" test, Cobb had the good fortune to commit his murders close on the heels of his burglary. The Court should grant the State's petition both to correct that unjustifiable result, and also to clarify the appropriate test for attachment of the Sixth Amendment right to counsel to factually related offenses.

CONCLUSION

The Court of Criminal Appeals's decision in this case implicates two important and unsettled areas of Sixth Amendment law. This Court should grant the State's petition to resolve these critical aspects of federal constitutional jurisprudence.

Respectfully submitted,

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APPENDIX A

Raymond Levi COBB, Appellant,
v.
The STATE of Texas.

No. 72,807.

Court of Criminal Appeals of Texas,
En Banc.

March 15, 2000.

Before the court en banc.

OPINION

MANSFIELD, J., delivered the opinion of the Court, in which MEYERS, PRICE, HOLLAND, WOMACK, and JOHNSON, JJ., joined.

Appellant, Raymond Levi Cobb, was found guilty of intentionally killing two people in a single criminal transaction. *See* TEX. PEN. CODE §19.03. His punishment was assessed at death. In eleven points of error, he argues that he is entitled to a new trial or at least a reformation of his sentence from death to imprisonment for life. We will reverse the judgment of the trial court and remand the cause for a new trial.

We turn first to appellant's eleventh point of error, in which he contends that the evidence adduced at trial was legally insufficient to support the jury's affirmative answer to the first punishment issue, concerning his future dangerousness. *See* Art. 37.071,

§2(b)(1).[1] Appellant argues that the evidence was insufficient because (1) he was only seventeen years old at the time of the offense, (2) he had no prior history of violent conduct, (3) he had no prior convictions, (4) the testimony of prosecution witness Dr. Frederick Mears, a licensed clinical psychologist, was "inherently unreliable" and thus inadmissible because he did not actually examine appellant, and (5) defense witness Dr. Walter Quijano, also a licensed clinical psychologist, testified that appellant would not likely be a future danger if imprisoned for life.

Under the first punishment issue, the jury was asked to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071, §2(b)(1). The State had the burden of proving the first punishment issue beyond a reasonable doubt. Art. 37.071, §2(c). Thus, the State had the burden of proving beyond a reasonable doubt that there is a probability that appellant, if allowed to live, would commit criminal acts of violence, so as to constitute a continuing threat, whether in or out of prison. *Narvaiz v. State*, 840 S.W.2d 415, 424 (Tex.Crim.App.1992), *cert. denied*, 507 U.S. 975, 113 S.Ct. 1422, 122 L.Ed.2d 791 (1993). In its determination of this issue, the jury was entitled to consider all of the evidence presented at both the guilt/innocence and punishment stages of trial. *Valdez v. State*, 776 S.W.2d 162, 166-167 (Tex.Crim.App.1989), *cert. denied*, 495 U.S. 963, 110 S.Ct. 2575, 109 L.Ed.2d 757 (1990). As an appellate court reviewing the jury's finding, we view all of the record evidence, whether properly or improperly admitted, in the light most favorable to the prosecution, and then determine whether, based on that evidence, any rational jury could have found beyond a reasonable doubt that the answer to the first punishment issue was "yes." *Miles v. State*, 918 S.W.2d

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[1]All references to articles are to those in the Texas Code of Criminal Procedure.

511, 512 (Tex.Crim.App.1996); *Harris v. State*, 738 S.W.2d 207, 225-226 (Tex.Crim.App.1986), *cert. denied*, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). This standard of review gives full play to the jury's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the evidence. *See Jackson Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). If we find that the evidence was legally insufficient to support the jury's affirmative answer, then we must reform the trial court's judgment to reflect a sentence of life imprisonment. Art. 44.251(a).

Viewed in the necessary light, the evidence at the guilt/innocence stage established that sometime between 5:45 a.m. and 5:15 p.m., December 27, 1993, appellant burglarized the Lindsey and Margaret Owings residence in a rural part of Walker County and stole a stereo system, a videocassette recorder, and other items. In the course of the burglary, appellant intentionally killed 22-year-old Margaret Owings and sixteen-month-old Kori Rae Owings. The evidence at the punishment stage, viewed in the necessary light, established that appellant has a dangerous personality disorder and lacks any regard for the welfare of others. We hold that, based on the totality of the evidence presented at trial, a rational jury could have found beyond a reasonable doubt that appellant is dangerous and incorrigible and that the answer to the first punishment issue is "yes." The jury was not required to give controlling weight to appellant's youth or lack of a violent past or criminal record. Nor was the jury required to give controlling weight to Dr. Mears' failure to examine appellant personally. We overrule appellant's eleventh point of error.

We turn next to appellant's fourth point of error, in which he contends that the trial court erred in admitting in evidence, at the guilt/innocence stage, a written statement he gave to police shortly after his arrest. Appellant, citing *Michigan v. Jackson*, 475 U.S.

625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), and *Upton v. State*, 853 S.W.2d 548 (Tex.Crim.App.1993), argues that the police obtained the statement in violation of his Sixth Amendment right to counsel because the police initiated interrogation of him without first notifying his counsel of record. The State argues in response that, at the time the police interrogated appellant, his Sixth Amendment right to counsel had not yet attached. The State argues in the alternative that even if the right had attached, the right had been waived because on two previous occasions defense counsel had allowed police to interrogate appellant without counsel being present.

The facts relevant to this point of error are as follows: On December 27, 1993, Lindsey Owings notified the Walker County Sheriff's Office that his home had been burglarized and that some of his property had been stolen. He also reported that his wife, Margaret, and his daughter, Kori Rae, were missing. Sometime in early February 1994, the sheriff's office received an anonymous tip that appellant, who resided across the street from the Owings residence, might have been involved in the burglary. Walker County investigators questioned appellant about the burglary and the disappearances, but he denied any involvement. On July 15, 1994, after further questioning by investigators, appellant, who was then under arrest in an unrelated case, gave a written statement in which he confessed to the burglary. He continued to insist, however, that he knew nothing about the disappearances. A Walker County grand jury subsequently indicted appellant for the burglary.

On August 15, 1994, attorney Hal Ridley was appointed to represent appellant in the burglary case. Shortly thereafter, Walker County investigators sought Ridley's permission to question appellant again about the disappearances. Ridley gave his permission, but only after being assured that appellant was not a

suspect in the disappearances. The investigators then questioned appellant, and he again denied any involvement.

On September 13, 1995, Walker County investigators again sought Ridley's permission to question appellant about the disappearances, and again he gave permission, still believing that appellant was not a suspect. During the questioning, appellant again denied any involvement.

On November 11, 1995, appellant's father, Charles Cobb, who resided in Odessa, telephoned the Walker County Sheriff's Office with information regarding appellant, who was then free on bond in the still-pending burglary case and also residing in Odessa. Mr. Cobb reported that appellant had just confessed to him that he had killed Margaret Owings while in the course of burglarizing her home and that he had buried her body in a wooded area not far from the home. Walker County investigators instructed Mr. Cobb to proceed to an Odessa police station to give a statement, which he did. The Odessa police faxed Mr. Cobb's statement to Walker County, and investigators there used the statement to obtain an arrest warrant, which they faxed back to Odessa. The Walker County investigators neglected, however, to inform the Odessa police that appellant had counsel in the burglary case. The Odessa police then located appellant, arrested him, Mirandized[2] him, and interrogated him. After ninety minutes of questioning, appellant gave a written statement in which he admitted killing both Margaret and Kori Rae Owings while in the course of burglarizing their home.

Having explicated the relevant facts, we turn now to the relevant law, which is both settled and familiar. The Sixth

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." This right to counsel was made applicable to state felony prosecutions by the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 797, 9 L.Ed.2d 799 (1963). The purpose of the right to counsel is to protect the unaided layman after the adverse positions of government and defendant have solidified with respect to a particular alleged crime. *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 2209, 115 L.Ed.2d 158 (1991). The right thus attaches at the initiation of adversarial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment, and no request for counsel need be made by the accused. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 1239, 1242, 51 L.Ed.2d 424 (1977). Once the Sixth Amendment right to counsel attaches, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the right to counsel applies. *Michigan v. Jackson*, 106 S.Ct. at 1407-1408. Therefore, for the fruits of post-indictment interrogations to be admissible in a prosecution's case-in-chief, the State must prove a voluntary, knowing, and intelligent waiver of the right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 2394-2395, 101 L.Ed.2d 261 (1988). However, once the right to counsel has attached and has been invoked, any subsequent waiver during police-initiated interrogation is ineffective unless counsel has first given permission for the interrogation. *Michigan v. Jackson*, 106 S.Ct. at 1411.

Also relevant to this case is the Sixth Amendment rule that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged. *State v. Frye*, 897 S.W.2d 324, 328-329 (Tex.Crim.App.1995); *Upton v. State*, 853 S.W.2d at 555-556; *accord*, *United States v. Arnold*, 106 F.3d 37, 41 (3rd Cir.1997),

and cases cited therein; *see* 2 W. LaFAVE, ET AL., CRIMINAL PROCEDURE §6.4(f) n.127 (2nd ed.1999). This rule prevents the government from circumventing the Sixth Amendment right to counsel merely "by charging a defendant with additional crimes after questioning him without counsel present," *United States v. Arnold*, 106 F.3d at 41, or "by charging predicate crimes with the purpose of questioning a suspect on an aggravated crime," *Upton v. State*, 853 S.W.2d at 556.

Relevant to this case, too, is the "Sixth Amendment ... require [ment] that we impute the State's knowledge from one state actor to another." *Michigan v. Jackson*, 106 S.Ct. at 1410. "One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." *Ibid.*

We now apply these rules of law to the case at bar. Once appellant was indicted for the Owings burglary, his Sixth Amendment right to counsel attached to that offense and to the capital murder offense, which was factually interwoven with the burglary. It is also true that once appellant's right to counsel attached, he asserted it by accepting Ridley's appointment as his counsel. Therefore, before the Odessa police could lawfully question appellant about the disappearances of the Owings, they were under an obligation to contact Ridley and get his permission. They failed to do that. Consequently, the fruits of the Odessa police interrogation, including appellant's written statement, were inadmissible in the prosecution's case-in-chief.

The fact that Ridley twice gave permission to Walker County investigators to question appellant is irrelevant. Nothing in the record suggests that Ridley's permission was intended to be continuing or could have reasonably been so interpreted.

Having found constitutional error, we still need not reverse appellant's conviction if we determine that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); TEX. R. APP. PROC. 44.2(a). If there is a reasonable likelihood that the error materially affected the jury's deliberations, then the error was not harmless beyond a reasonable doubt. *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988).

The record reflects that appellant's statement was incriminating and central to the prosecution's case against him. Therefore, a reasonable likelihood exists that the admission of the statement in evidence materially affected the jury's deliberations.

We sustain appellant's fourth point of error. In view of our disposition of appellant's fourth point of error, we need not address his remaining points of error. The judgment of the trial court is reversed, and the case is remanded for a new trial.

DISSENTING OPINION

McCORMICK, P.J, delivered a dissenting opinion in which KELLER and KEASLER, JJ., joined.

I respectfully dissent. Neither the facts nor the law support the Court's decision to suppress appellant's voluntary confession. Because appellant lost in the trial court on his suppression motion, no one can dispute that the Court is required to view the evidence in the light most favorable to the trial court's decision to admit appellant's voluntary confession.[1] But, the Court's opinion does not view the evidence this way and, consequently, it misstates key facts upon which it decides to suppress appellant's voluntary confession.

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[1] *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Cr.App.1997).

More important is that even under the Court's version of the facts, the law is not as "settled and familiar" as the Court's opinion would have it. Various United States Supreme Court precedents can be read to support two contrary holdings in this case. I would either apply the body of law that balances the competing interests in favor of admitting appellant's voluntary confession[2] or, assuming the other body of law requires suppression of appellant's voluntary confession, I would decline to follow it.

I. THE RELEVANT FACTS UNDER A PROPER APPLICATION OF THE GUZMAN STANDARD OF REVIEW REQUIRING THE COURT TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE TRIAL COURT'S RULING ON APPELLANT'S SUPPRESSION MOTION.

Appellant voluntarily confessed during police-initiated custodial interrogation to murdering a mother and burying her baby alive. According to appellant's voluntary confession, he stabbed the mother while burglarizing her home. He took the mother's body to some "woods a good ways away from the house, maybe two or three hundred yards from her house." Appellant's voluntary confession then states:

> "I went back to her house and I saw the baby laying on its bed. I took the baby out there and it was sleeping the whole time. I laid the baby down on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back

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[2] *See McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 2210, 115 L.Ed.2d 158 (1991) ("ready ability to obtain uncoerced confessions is not an evil but an unmitigated good" and is "essential to society's compelling interest in finding, convicting, and punishing those who violate the law").

> over to where they were and I started digging a hole between them. After I got the hole dug, the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then."

Appellant made this voluntary confession approximately 15 months after Ridley had been appointed to represent appellant on a formal charge of burglarizing the victims' home. During these 15 months appellant admitted only to burglarizing the victims' home. Also, during these 15 months the police were unable to find the victims. The police considered appellant a suspect in the victims' disappearances. Appellant made bond in the burglary case and he moved to another town.

When appellant voluntarily confessed to murdering the victims, appellant had been arrested on a warrant which was based on new information the police received from appellant's father who implicated appellant in the victims' murders. Appellant had confessed to his father that he killed the victims.

Soon after appellant's arrest the police questioned appellant and he voluntarily confessed to murdering the victims. Ridley was unaware that appellant's father had implicated appellant in the victims' murders or that appellant had been arrested for and questioned by the police about the victims' murders.

Before appellant voluntarily confessed, the police informed appellant of his right to have a lawyer present during the interrogation and appellant unilaterally and voluntarily waived that right. The police who obtained appellant's confession were unaware that Ridley represented appellant in the burglary case. Shortly after

appellant voluntarily confessed, he led the police to where he buried the victims' bodies.

The Court's opinion asserts as a matter of fact that Ridley gave the police permission to question appellant "but only after being assured that appellant was not a suspect in the disappearances." The implication seems to be that any permission the police had from Ridley to question appellant when appellant voluntarily confessed was ineffective because this permission was obtained fraudulently. But, viewed in the light most favorable to the trial court's ruling, the evidence supports a contrary finding.

Although Ridley testified that he did not know until September 1995 that appellant was a suspect in the victims' disappearances, Ridley also admitted that the police "always said they thought [appellant] knew more than what he was saying" about the victims' disappearances.

> "Q. You have heard the testimony the last two days from Detective Judy James and Detective Debbie Funk--or actually you did not hear Debbie Funk's testimony, but they indicated that Cobb was always a suspect in this case.
> "A. Well, I had gone out to the jail on another matter later. After Haley and James spent about three hours with him that day I went out to the jail, probably the next week, to see some other people and got in a conversation with Sheriff Meyers. And Sheriff Meyers at that time personally told me that he thought Cobb was a suspect all along. He flat told me he thought Cobb was guilty; he just couldn't prove it. And that was the first time I was aware--
> "Q. What date is--
> "A. This would have been about a week after Haley and James talked to him. It was that same month. This was prior to the news breaking, though, that he had given a

statement. "Q. This was after Haley and James' contact with him with your permission on September 13, 1995, approximately a week later?
"A. Right.
"Q. But prior to that no law enforcement personnel had ever informed you that Cobb was a suspect?
"A. They always said they thought he knew more than he what he was saying, but in fact I still had no reason to believe the person I was originally informed was the suspect wasn't still the suspect." (Emphasis Supplied).

This testimony together with the evidence that appellant admitted burglarizing the victims' home at the time they disappeared support a finding that Ridley knew all along that appellant was a suspect in the victims' disappearances. And, even if Ridley did not know until September 1995 that appellant was a suspect, there still is no evidence that upon learning this information Ridley withdrew the unqualified permission he had twice given to the police to question appellant.

The Court's opinion, however, asserts as a matter of fact that this is "irrelevant" because nothing "in the record suggests that Ridley's permission was intended to be continuing or could have reasonably been so interpreted." Viewed in the light most favorable to the trial court's ruling, the evidence supports contrary findings. Ridley twice gave the police permission to question appellant. Significantly, neither the police nor Ridley testified that this permission was in any way limited. Detective Haley testified that in September 1995 when Ridley gave him permission to question appellant and when, according to Ridley, this was when Ridley learned appellant was a suspect in the victims' disappearances, Ridley "said it was okay, if it was okay with" appellant.

"Q. This was on September--

"A. September the 13th, 1995.
"Q. And he agreed to participate or cooperate with you?
"A. Yes, sir.
"Q. In fact you discussed this with his attorney and the attorney said it was okay, if it was okay with [appellant]?
"A. Yes, sir." (Emphasis Supplied).

Ridley testified that he allowed law enforcement to speak with appellant.

"Q. You have always allowed law enforcement to speak with your clients even outside your presence?
"A. I have in the past, or--
"Q. Yes.
"A. I have in the past on certain occasions, and I did in this case."

Ridley even gave the police permission to take appellant to the location of the victims' bodies soon after appellant voluntarily confessed to murdering them.

"Q. All right.
"A. And then I was contacted the next evening, and I thought--it may have been James that called me, but I thought it was David Weeks that asked if [appellant] could go out there and--
"Q. Again?
"A. Yeah. This would have been the next night, and asked if [appellant] could go out there or if I had any objections to him going out there with Haley and James. And then he left me--I think he left me the number to call James directly and contact her. I think that's how that went because for some reason I almost want to swear that I was--I had talked to him first about it. And I told him, 'Well, you know, I don't

know what else he could tell you,' but I did not deny them permission to take him out there."
(Emphasis Supplied).

Ridley also testified that any contact the police may have had with appellant after November 14th "was without [his] permission."

"Q. To the best of your knowledge he has not had any further contact?
"A. Shouldn't have had after [November 14th]. If he did, it was without my permission." (Emphasis Supplied).

From this testimony alone, the trial court could have found that the police had Ridley's permission to question appellant at any time before November 14, 1995. Contrary to the factual assertions in the Court's opinion, there is evidence in the record to support a finding "that Ridley's permission was intended to be continuing" as long as "it was okay" with appellant.

As to the Court's factual assertion that Ridley's permission could not reasonably have been interpreted as being continuing, the evidence, viewed in the light most favorable to the trial court's ruling, supports a contrary finding. The record supports a finding that, having twice received permission from Ridley to question appellant, the police without contacting Ridley questioned appellant on other occasions even though Ridley might have been under the impression that the police contacted him whenever they wanted to question appellant.[3]

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[3] "Q. So prior to November, 1995, every time the law enforcement officials and/or members of the District Attorney's Office decided they needed to talk to [appellant] concerning the disappearance of [the victims] they always contacted you and asked you for your permission?
"A. I would say yes because [appellant] never called me and indicated

For example, Detective Thomas testified that the police had questioned appellant on "previous occasions."

"Q. So to clarify this, Detective James indicated to you that they had talked to [appellant] on previous occasions and he had never indicated on these previous occasions that he had any involvement in the disappearance of the [victims]?
"A. Right."

Later, Detective Thomas testified that the police had questioned appellant "several times."

"Q. All right. What happened next?
"A. Detective Sikes began a line of questioning about the disappearance of the [victims], and [appellant] denied it. [Appellant] went into about talking to the investigators here in Walker County, and he said he had already spoken with them several times. He had been arrested on a burglary charge stemming out of this same investigation. And he denied over and over that he had nothing (sic) to do with them missing, and he got somewhat agitated with Detective Sikes." (Emphasis Supplied).

In any event it makes no difference that the police may have contacted Ridley whenever they wanted to question appellant because, viewed in the light most favorable to the trial court's ruling, the evidence supports a finding that the police had Ridley's permission to question appellant at any time before November 14th as long as "it was okay" with appellant. In deciding otherwise, the Court misapplies the Guzman standard of review by not viewing

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otherwise, and on each occasion I gave my permission believing he wasn't a suspect." (Emphasis Supplied).

the evidence in the light most favorable to the trial court's ruling on appellant's suppression motion.

II. EVEN UNDER THE COURT'S VERSION OF THE FACTS, APPELLANT'S VOLUNTARY CONFESSION IS STILL ADMISSIBLE

The Court decides: (1) the police violated a prophylactic rule meant to safeguard the Sixth Amendment right to counsel when the police initiated questioning of appellant after he had "asserted" his Sixth Amendment right to counsel during arraignment on the burglary charge some 17 months before appellant confessed, and (2) suppression of appellant's voluntary and reliable confession is the appropriate remedy as a means to deter the kind of "egregious police misconduct" that the Court implicitly decides occurred in this case. I would decide that the police did not violate any prophylactic rule meant to safeguard the Sixth Amendment right to counsel and that appellant made a valid waiver of his Sixth Amendment right to counsel before he voluntarily confessed.

For reasons more fully set out in this opinion, the federal constitutional issue actually presented is: can a represented-by-counsel defendant whose Sixth Amendment right to counsel has attached to an offense unilaterally make a valid waiver of this Sixth Amendment right to counsel upon police-initiated interrogation about this offense? Some United States Supreme Court precedent supports holding that such a defendant can unilaterally make a valid waiver of his Sixth Amendment right to counsel even when that defendant previously has asserted his Sixth Amendment right to counsel. *See generally State v. Frye*, 897 S.W.2d 324, 331-32 (Tex.Cr.App.1995) (McCormick, P.J., concurring and dissenting).

In *Brewer v. Williams*, the United States Supreme Court in a lead opinion authored by Justice Stewart and joined by Justice Brennan decided that a defendant in a case like this did not validly waive his Sixth Amendment right to counsel. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 1243, 51 L.Ed.2d 424 (1977). The Court, however, decided that such a defendant could unilaterally make a valid waiver of his Sixth Amendment right to counsel even when the defendant previously has asserted his right to counsel, otherwise it would have been unnecessary for Brewer to decide whether the defendant validly waived his right to counsel:

> "Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.
>
> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case[4] [the defendant] could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. [Footnote Omitted]. It only held, as we do, that he did not."

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[4] Consistent with how the Court's opinion characterizes the circumstances of this case, the "circumstances of [the *Brewer*] case" involved police-initiated interrogation of a represented-by-counsel and formally charged defendant who had asserted his Sixth Amendment right to counsel. *See Brewer*, 97 S.Ct. at 1242-43.

Williams, 97 S.Ct. at 1243 (Emphasis in Original); *see also Frye*, 897 S.W.2d at 332 (McCormick, P.J., concurring and dissenting).

Several Justices filed separate concurring and dissenting opinions in Brewer. Justice Marshall's and Justice Powell's concurring opinions joined Justice Stewart's lead opinion. *See Brewer*, 97 S.Ct. at 1244-45 (Marshall, J., concurring) and at 1245-47 (Powell, J., concurring). Justice Stevens' concurring opinion also joined Justice Stewart's lead opinion and the concurring opinions of Justices Powell and Marshall. *See Brewer*, 97 S.Ct. at 1247-48 (Stevens, J., concurring).[5]

Chief Justice Burger filed a dissenting opinion. *See Brewer*, 97 S.Ct. at 1248-55 (Burger, C.J., dissenting). His dissenting opinion, consistent with Justice Stewart's lead opinion, recognized "that a valid waiver was possible in these circumstances, but was not quite made." *See Brewer*, 97 S.Ct. at 1250 (Burger, C.J., dissenting) (Emphasis in Original).

Justice White also filed a dissenting opinion which was joined by Justices Rehnquist and Blackmun. *See Brewer*, 97 S.Ct. at

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[5] The concurring opinions of Justices Marshall, Powell and Stevens arguably failed to understand that Justice Stewart's lead opinion decided that the defendant unilaterally or "without notice to counsel" could have made a valid waiver of his "rights under the Sixth and Fourteenth Amendments." *Compare Brewer*, 97 S.Ct. at 1243 (Stewart, J.), *with, Brewer*, 97 S.Ct. at 1244-45 (Marshall, J., concurring) (apparently would have decided that the defendant could not unilaterally make a valid waiver of his Sixth and Fourteenth Amendment rights), and at 1246 (Powell, J., concurring) (erroneously claiming that Justice Stewart's lead opinion was "explicitly clear that the right to assistance of counsel may [not] be waived, after it has attached, without notice to or consultation with counsel"), and at 1247-48 (Stevens, J., concurring).

1255-59 (White, J., dissenting). His dissenting opinion, consistent with Justice Stewart's lead opinion, also recognized that Justice Stewart's lead opinion created "no new rule preventing an accused who has retained a lawyer from waiving his right to the lawyer's presence during questioning." *See Brewer*, 97 S.Ct. at 1257 (White, J., concurring).

So, as things stood in 1977 when Brewer was decided, at least six United States Supreme Court Justices, a majority, shared the view that a defendant could unilaterally make a valid waiver of his Sixth Amendment right to counsel even when the defendant previously has asserted his Sixth Amendment right to counsel. *See Brewer*, 97 S.Ct. at 1243 (Stewart, J., joined by Brennan, J.), and at 1250 (Burger, C.J., dissenting), and at 1257 (White, J., dissenting, joined by Blackmun and Rehnquist, J.J.).[6] And, as late as 1985 other United States Supreme Court precedent was consistent with *Brewer* in Sixth Amendment cases[7] despite the soon to be discussed United States Supreme Court adoption of various prophylactic rules in the Fifth Amendment context.

This brings us to the "relevant law" which the Court's opinion claims is "settled and familiar." The Court's opinion relies on *Michigan v. Jackson* which in 1986 applied the just mentioned Fifth

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[6] And, arguably the three other Justices in *Brewer* subscribed to this view since they joined Justice Stewart's lead opinion instead of concurring in the judgment or the result.

[7] *See Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 1144, 89 L.Ed.2d 222 (1985) ("It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches"). (Emphasis Supplied).

Amendment *Miranda v. Arizona*/*Edwards v. Arizona*[8] prophylactic rules to the Sixth Amendment context. *See Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631 (1986).[9] *Jackson* held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any [unilateral] waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *See Jackson*, 106 S.Ct. at 1411.

But, *Jackson*, instead of overruling or disapproving *Brewer*, actually relied on *Brewer*. *See Jackson*, 106 S.Ct. at 1410 fn. 9. This is curious since *Brewer* is flatly inconsistent with and contrary

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[8] *See Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[9] Just as the *Miranda v. Arizona*/*Edwards v. Arizona* prophylactic rules are not Fifth Amendment rights but are meant to safeguard the underlying Fifth Amendment right against compelled self-incrimination, the *Jackson* prophylactic rule also is not a Sixth Amendment right but is meant to safeguard the underlying Sixth Amendment right to counsel. *See Baker v. State*, 956 S.W.2d 19, 23-24 (Tex.Cr.App.1997). This raises the question of whether, under principles of federalism, we are even required to follow *Jackson*. *See United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir.), *cert. granted*, S.Ct. (1999) (*Miranda* is not a constitutional rule so Congress had the power to overrule it).

It also should be noted that the United States Supreme Court is currently reconsidering *Miranda* in favor of a pure voluntariness test. See id.; *see also Brewer*, 97 S.Ct. at 1259 (Blackmun, J., dissenting) (noting that at least 22 states were urging the Supreme Court to overrule *Miranda*). If the Supreme Court overrules *Miranda* and adopts a voluntariness test, then that would render cases like *Edwards* and *Jackson* obsolete and the issue in this case moot. The Court should, therefore, hold this case until the Supreme Court decides whether to retain *Miranda*.

to *Jackson*'s holding. *See Jackson*, 106 S.Ct. at 1413 (Rehnquist, J., dissenting). This creates a conflict between *Brewer* and *Jackson* either of which the Court may choose to apply.

And, having chosen to apply *Jackson*, the Court's opinion fails to appreciate that this case is distinguishable from *Jackson* in three important respects. In *Jackson* the police initiated interrogation of the defendants shortly after their "request" for counsel at arraignment. *See Jackson*, 106 S.Ct. at 1406. In this case, however, the police initiated interrogation some 17 months after appellant's arraignment.[10]

Another distinction between this case and *Jackson* is that appellant did not unequivocally assert his right to counsel at any time before the police-initiated interrogation. The evidence is to the contrary. [11]

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[10] *See Jackson*, 106 S.Ct. at 1413 (Rehnquist, J., dissenting) ("the Court most assuredly does not hold that the *Edwards* per se rule prohibiting all police-initiated interrogation applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant").

[11] *Jackson* would not support the Court's holding unless appellant asserted his right to counsel. If appellant did not assert his right to counsel or if his or his lawyer's actions indicate some type of waiver of any previous assertion of this right, then the Court would have to find some other basis to exclude appellant's voluntary confession. The Court's opinion decides appellant asserted his right to counsel "by accepting Ridley's appointment as his counsel" at appellant's arraignment on the burglary charge. This is not an unequivocal assertion of the right to counsel. *See Jackson*, 106 S.Ct. at 1406 (defendants explicitly requested appointment of counsel at their arraignment). At most, appellant's "accepting Ridley's appointment as his counsel" was an equivocal assertion of the right to counsel.

This cannot be considered an assertion of the right to counsel under

The other distinction between this case and *Jackson* is that after any assertion of appellant's right to counsel at arraignment the police twice received permission from appellant's lawyer to question appellant and the police questioned appellant on "numerous occasions" over a 17 month period without any objections from appellant or his lawyer. These actions by appellant and his lawyer amount to a type of waiver of any previous assertion of the right to counsel some 17 months before appellant confessed. Under these circumstances, it defies common sense to decide that a 17-month-old assertion of the right to counsel would still be effective.

Jackson, therefore, is neither "relevant" nor controlling.

It now becomes necessary to address this Court's federal constitutional decisions in *Holloway v. State*,[12] *Upton v. State*,[13] and *Frye v. State*.[14] Holloway clearly decided, as a matter of federal constitutional law, that a represented-by-counsel defendant cannot unilaterally make a valid waiver of his Sixth Amendment right to

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United States Supreme Court precedent decided after *Jackson*. *See Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 2356, 129 L.Ed.2d 362 (1994) (police interrogation need not cease in response to equivocal assertion of right to counsel); *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex.Cr.App.1996) (same rule with respect to equivocal assertions of right to remain silent). These rules apply in cases like this since they too are just an extension of the *Miranda v. Arizona/Edwards v. Arizona* line of cases. The Court, therefore, should analyze whether appellant asserted his right to counsel under these cases. The point is that something which *Jackson* might have considered an assertion of the right to counsel may not be so under these later cases that were decided after *Jackson*.

[12] *Holloway v. State*, 780 S.W.2d 787 (Tex.Cr.App.1989).

[13] *Upton v. State*, 853 S.W.2d 548 (Tex.Cr.App.1993).

[14] *Frye*, 897 S.W.2d at 327-29.

counsel during police- initiated interrogation on offenses to which the Sixth Amendment right to counsel has attached. *See Holloway*, 780 S.W.2d at 795-96. Under *Holloway*, it makes no difference whether this defendant previously has asserted his right to counsel.[15]

Holloway relied on various United States Supreme Court decisions none of which clearly support its holding. More important, *Holloway* did not address *Brewer*.[16] *Holloway* noted that

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[15] This Court originally affirmed the defendant's conviction in *Holloway*. *See Holloway*, 780 S.W.2d at 788. After granting the defendant's petition for certiorari, the United States Supreme Court remanded the case to this Court for reconsideration in light of *Jackson*. *See Holloway v. Texas*, 475 U.S. 1105, 106 S.Ct. 1508, 89 L.Ed.2d 908 (1986); *Holloway*, 780 S.W.2d at 788. On remand from the United States Supreme Court, this Court rejected the defendant's claim based on *Jackson* by deciding that the defendant never asserted his right to counsel. *See Holloway*, 780 S.W.2d at 790 (deciding that *Jackson* was inapplicable).

This Court, however, went on to reverse the case based on another soon to be discussed case the United States Supreme Court decided after *Jackson*. *See Holloway*, 780 S.W.2d at 794-96.

[16] For example, *Holloway* cited *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). This is the case where a police agent secretly recorded conversations between the defendant and his lawyer. *See Moulton*, 106 S.Ct. at 487. *Moulton* and cases like it do not support Holloway's holding because in these cases "the nature of the police conduct was such that it would have been impossible to find a valid waiver of the defendant's Sixth Amendment right to counsel." *See Jackson*, 106 S.Ct. at 1414 (Rehnquist, J., dissenting).

Holloway also relied on United States Supreme Court jurisprudence on a capital defendant's Sixth Amendment right to counsel during psychiatric examinations on the future dangerousness punishment issue. *Holloway*, 780 S.W.2d at 795-96; *see Powell v. Texas*, 492 U.S. 680, 109 S.Ct. 3146, 3149-50, 106 L.Ed.2d 551 (1989) (formally charged capital

in *Patterson v. Illinois*,[17] which came after *Jackson*, the Supreme Court decided that an unrepresented- by-counsel defendant who had not previously asserted his right to counsel could unilaterally make a valid waiver of his Sixth Amendment right to counsel. *See Holloway*, 780 S.W.2d at 794-95.

Holloway's contrary holding for a represented-by-counsel defendant was based in part on footnote three of *Patterson* which says "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney- client relationship takes effect" where an accused's Sixth Amendment right to counsel has attached and he is represented by counsel.[18] The Supreme Court has yet to decide what these "distinct set of constitutional safeguards" are.

Upton and *Frye* relied mainly on *Holloway* and the authorities upon which *Holloway* relied. *Upton* also noted a possible conflict between *Holloway* and *Brewer*. *See Upton*, 853 S.W.2d at 553 fn.

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defendant's Sixth Amendment right to counsel precludes psychiatric examination on future dangerousness without notice to counsel). In *Powell*, the defendant was neither warned of his rights during the psychiatric examination nor was his counsel notified of the psychiatric examination. *See Powell*, 109 S.Ct. at 3148. The Supreme Court decided that this violated the defendant's Sixth Amendment right to counsel. *See Powell*, 109 S.Ct. at 3150. Consistent with *Brewer*, however, part of the rationale for the Supreme Court's decision in Powell was that there was "no basis for concluding that [the defendant] waived his Sixth Amendment right." *See id. Powell* did not decide whether the defendant could have unilaterally waived this right. The *Powell* line of cases, therefore, do not clearly support *Holloway's* holding.

[17] *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).

[18] *See Patterson*, 108 S.Ct. at 2393 fn. 3; *Holloway*, 780 S.W.2d at 795.

2. For these reasons, I would decline to follow *Holloway*, *Upton* and *Frye*.

With this in mind, it is clear that *Brewer* and *Jackson* conflict on whether a represented-by-counsel defendant can unilaterally make a valid waiver of his Sixth Amendment right to counsel when that defendant previously has asserted his Sixth Amendment right to counsel. *Brewer* says he can. *Jackson* says he cannot. *Patterson* further muddies the waters when it says that in cases like this a "distinct set of constitutional safeguards" exists without saying what these safeguards are. The law is not as "settled and familiar" as the Court's opinion says.[19] There needs to be some clarification on the "waiver" issue and on what "distinct set of constitutional safeguards" exists in cases like this.

Until this happens, I would decide consistent with *Brewer* and a proper balancing of the competing interests that a defendant can unilaterally make a valid waiver of his Sixth Amendment right to counsel in cases like this even when this defendant previously has asserted his right to counsel or, as the Court's opinion says, has "accepted" appointment of counsel. There is enough ambiguity and conflict in existing United States Supreme Court case law for this Court to give the benefit of the doubt to the law-abiding citizens of this state and decide that appellant's voluntary confession should be admitted into evidence. This is especially true since we are only dealing with alleged violations of prophylactic rules and not violations of constitutional rights. To the extent Jackson's prophylactic rule would require a contrary result, I would decline to follow it. *See Dickerson*, 166 F.3d at 672.[20]

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[19] *See Jackson*, 106 S.Ct. at 1414 (Rehnquist, J., dissenting) ("Court lacks a coherent, analytically sound basis for its decision" in cases like this).

[20] I also disagree with the Court's *McNeil v. Wisconsin* analysis. *See McNeil*, 111 S.Ct. at 2207. I would decide that appellant's Sixth

III. HARM

I also would decide that admission of appellant's voluntary confession was harmless. Any error in the admission of appellant's voluntary confession was rendered harmless by the admission of appellant's confession to his father that he murdered the victims. *See Leday v. State*, 983 S.W.2d 713, 717 (Tex.Cr.App.1998). The evidence further shows appellant burglarized the victims' home at the time of their disappearances. The jury would have used this evidence and the other evidence presented by the prosecution to convict appellant with or without his voluntary confession.

IV. TAINTED "FRUIT"

Finally, it should be noted that any "fruits" of appellant's voluntary confession are admissible. This is because the Court decides that appellant's voluntary confession was obtained in violation of only a prophylactic rule meant to safeguard Sixth Amendment rights. *See Jackson*, 106 S.Ct. at 1411; *Baker*, 956 S.W.2d at 23-24. The "fruits" of voluntary confessions obtained in violation of prophylactic rules are admissible. *See id.* And, I do not understand the Court's opinion to decide that the prosecution is

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Amendment right to counsel on the capital murder offense had not attached when appellant confessed to this offense. *See McNeil*, 111 S.Ct. at 2207 (Sixth Amendment right to counsel is offense-specific). The facts of this case are much different than the facts of *Upton* and do not fall within *Upton*'s "exception" to a "strict application" of *McNeil*. *See Upton*, 853 S.W.2d at 554-56. In *Upton* the defendant confessed to the capital offense after having been in custody for approximately two weeks after he committed the offense. *See id.*

In this case, appellant confessed approximately 17 months after he committed the offense during which time he was on the streets. The potential for police abuse identified in *Upton* does not exist here. *See id.*

precluded from making this claim on remand since the prosecution has had no reason to raise it earlier.

I respectfully dissent.

APPENDIX B

[Excerpt from Suppression Hearing Testimony of Hal R. Ridley]

[R 3:449-469]

Hal R. Ridley

having been first duly cautioned and solemnly sworn to tell the truth, the whole truth, and nothing but the truth was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GREEN:

Q State your name for the record, sir?
A Hal Ridley.
Q You do understand that you are under oath for these proceedings?
A Yes, I do.
Q How are you employed, Mr. Ridley?
A I'm a lawyer in private practice in Huntsville.
Q How long have you been—Are you licensed by the State Bar of Texas?
A Yes, I am.
Q I assume you're current on your bar dues and have paid your occupational tax?
A Yes, I have.
Q Now, you represent Raymond Levi Cobb in these proceedings?
A And have since—yes.
Q Now, when did you first become involved in representing Raymond Levi Cobb as his lawyer?
A Back in August of 1994, and I think it was the 28th was when I received the official appointment letter.

THE COURT: Just a moment.

BY MR. GREEN:

Q Were you appointed by the Court to represent Mr. Cobb in August of 1994?

A That's correct.

Q And in what capacity?

A Mr. Cobb had pending, I believe, at that time a burglary of habitation case and he may have had a drug case by that time, also. It was for a possession of marijuana, I believe, and both of them were felonies. Delivery of marijuana, I'm sorry.

THE COURT: And you were appointed on that case as well?

THE WITNESS: Right. I had been approached by Mr. Weeks . . .

MR. GREEN: Your Honor, I would like to object to the District Attorney prompting this witness and attempting to rehabilitate his testimony.

THE COURT: So noted.

BY MR. GREEN:

Q Please try to just directly answer my questions.

THE COURT: Would you like to take this witness as an adverse witness?

MR. GREEN: I already thought I had.

BY MR. GREEN:

Q So you were duly appointed by this Court, the 12th Judicial District, to represent Raymond Levi Cobb on burglary charges.

A Right, and delivery of marijuana.

Q Both of these being felony offenses?

A Yes, sir.

Q Now, were you aware—was there anything—Well, just tell what was unusual about your representation on the burglary charge?

A Well, I had been approached by Mr. Weeks concerning this case, and he had indicated that—Mr. Cobb, he indicated, was not a suspect at that time in the slayings of the missing girl and her mom, but he did indicate that he thought he knew something about it. And I remember questioning him about it because we were coming off the trial of another capital murder case that had taken some time out of county and I really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact the suspect.

Q By Mr. Weeks I assume you mean the Criminal District Attorney of Walker County, David P. Weeks?

A That's correct.

Q And when. . .

THE COURT: Are you sure this was August of '94? Is that when it was?

MR. GREEN: My understanding, Your Honor, is he was appointed August 15th.

THE COURT: It would have been at least that far back.

MR. GREEN: We've got the appointment in the file.

THE COURT: Off the record.

MR. RIDLEY: I'm sure it's August 28, 1994.

MR. WEEKS: Hal's right. I think he is right.

MR. GREEN: I have the appointment order here somewhere, Your Honor.

MR. WEEKS: He made this confession on the

burglary the 15th of July '94 so that would have been right. Mr. Ridley's memory is still working.

BY MR. GREEN:

Q To the best of your recollection you were appointed to represent him on the indictment concerning the burglary of the Owings residence approximately August 15th or thereabouts, 1994?

A That's correct.

Q And you testified that at this time you were made aware that there was that also—that this burglary was also connected to the disappearance of the—of Margaret Owings and her infant daughter, Kori?

A That's correct, and I was given the name of a possible suspect.

Q Not Raymond Cobb?

A Not Raymond Cobb.

Q Any you ascertained this information from a direct conversation with the District Attorney?

A And then subsequently reviewing the burglary file.

Q During the course of your representation of Mr. Cobb from August of 1994 until November 1995 did you have an occasion to make contact with law enforcement personnel who were investigating the disappearance of Margaret and Kori Owings?

A Yes.

Q Can you tell us the occasion?

A In fact it was—on each and every occasion it was in conjunction with me trying to negotiate a plea bargain arrangement, to be quite frank about it, on the burglary case. It was determined—or I was led to believe that the delivery case would be dismissed and we would be allowed to plead to a probation or deferred adjudication sentence on the burglary situation pending a little more investigation of the

missing Owings people.

What had happened was—And I was first contacted when Mr. Cobb showed up in Odessa at a docket call by Judy James or someone with—I think it was—I take it back. It was Steve Haas was who it was, and though Mr. Weeks indicated that they wanted to question Cobb about the case. And I, of course, told them to go right ahead.

Q You don't mean the burglary case?

A No, I'm talking about the missing people, the missing persons problem. And I did give my consent at that time and told them. . .

Q What time was this?

A When was this?

Q Yes.

A This was shortly after I was appointed because there was a docket call in the normal course of things. He came down for an arraignment is what is was. Whenever the docket call shows that he was arraigned would have been the time that they asked the first time permission to talk to him. I gave my permission and told them that it wasn't necessary for me to be there. And they discussed it with him and he—you know. We talked briefly. That's when his dad came with him, I believe, and they talked to me in my office. And at that time we never did make a deal. They decided, you know,—but he was talked to and released so I didn't think anything more of it.

The next time—I had gone ahead—The case was getting pretty old, and Raymond had showed up with his girlfriend and a friend who had driven them from Odessa unbeknownst to me. And so I contacted Mr. Weeks in an effort to try to work out a settlement of the burglary case since they had in fact come down from Odessa for purposes of the court date, and we came pretty close to doing it.

And then Mr. Weeks contacted, I believe, either

Sheriff Myers or someone else—and it may have Judy James—and indicated that Ranger Haley and Judy James did want to interrogate Raymond at that time. Again I gave my permission for them to interrogate him. And I know for a fact that he was with them for over three hours, and that was with Haley and James.

Q And you were in the courtroom when Lieutenant Haley, Ranger Haley testified that this occurred on September 13, 1995?

A That's quite—That's very accurate. I think that's right. I was thinking it was late ~~A~~august, but September would be accurate. I didn't hear him testify to that. I came in late, but I would not dispute that.

Q So prior to November, 1995, every time the law enforcement officials and/or members of the District Attorney's Office decided they needed to talk to your client, Raymond Cobb, concerning the disappearance of Margaret and Kori Owings they always contacted you and asked you for your permission?

A I would say yes because Mr. Cobb never called me and indicated otherwise, and on each occasion I gave my permission believing he wasn't a suspect.

Q Because you were led to believe all along that he was not a suspect?

A Well, we came very close in September to reaching an agreement, and then that's when David decided that he needed to talk with the people one more time. In fact that's what he said. "Let me call and if they don't need to see him any more, we will do a deal today."

Q You have heard the testimony the last two days from Detective Judy James and Detective Debbie Funk—or actually you did not hear Debbie Funk's testimony, but they indicated that Cobb was always a suspect in this case.

A Well, I had gone out to the jail on another matter later.

After Haley and James spent about three hours with him that day I went out to the jail, probably the next week, to see some other people and got in a conversation with Sheriff Meyers. And Sheriff Meyers at that time personally told me that he thought Cobb was a suspect all along. He flat told me he thought Cobb was guilty; he just couldn't prove it. And that was the first time I was aware. . .

Q What date is. . .

A This would have been about a week after Haley and James talked to him. It was that same month. This was prior to the news breaking, though, that he had given a statement.

Q This was after Haley and James' contact with him with your permission on September 13, 1995, approximately a week later?

A Right.

Q But prior to that no law enforcement personnel had ever informed you that Cobb was a suspect?

A They always said they thought he knew more than he was saying, but in fact, I still had no reason to believe the person I was originally informed was the suspect wasn't still the suspect.

Q This was a different party?

A Yes.

Q And who was this person?

A Tim Root, R-o-o-t. It's Raymond's sister's—I guess they may be married now. I know they have a child. They were boyfriend and girlfriend anyway.

Q At the time of the disappearance of Maggie Owings, Raymond Cobb's sister was dating or involved with Tim Root?

A That's correct.

Q And you were told that he was a suspect?

A That's correct.

Q And you were told that he was the main suspect?

A I was just told he was a suspect.
Q But other than your conversation with Dale Meyers a week after the September 13th meeting between—or interview and investigation involving Ranger Haley and Judy James you were not informed that he was a suspect?
A No.
Q All right. I want to take you to November 11th of 1995. You have heard all the testimony in here today, obviously, as Raymond Cobb's lawyer in this case. Did any person from the District Attorney's Office, Texas Rangers, Department of Public Safety, Walker County Sheriffs Office, or any other law enforcement agency contact you on the evening of November 11th concerning their desire to get Raymond Cobb to talk to his father?
A No.
Q Were you told at that time that any new heated investigation was going on concerning Raymond Cobb's involvement in the disappearance of Owings?
A No.
Q Were you informed in the early morning hours of November 12th that there was a warrant issued for Raymond Cobb's arrest charging him with capital murder?
A No, I was not.
Q Were you informed in the early morning hours of November 12, 1995, that Raymond Cobb has been taken into custody by Detectives Thomas and Sikes of the Odessa Police Department?
A No.
Q Were you informed that Raymond Cobb would be transported—was being transported between 9:00 and noon from Odessa to the Huntsville Memorial—or Huntsville International Airport?
A No, I wasn't.
Q I should say Huntsville Municipal Airport. When was the

first time you were informed that Raymond Cobb was under arrest, being interrogated, being asked to lead them on a search concerning the disappearance of the Owings?
A I don't believe I was ever told they were going—the fact of the search was sometime later. Mr. Weeks called me at my home, and I want to say it was Sunday evening, and informed me that Cobb had been—had given a statement implicating himself; that he was going to be brought back and—or that he had already been brought back, I guess it was, and that. . .
Q Sunday evening would have been the 13th, would it not?
A Right.

THE COURT: The 12th.

A Okay. I was sitting at home, and I remember—Well, I remember that it was Sunday because the next day I believe in the Item there was a big story about it, and it was the same day that Tim Freeman was murdered by Luis Lagaite. And I was Tim Freeman's lawyer, and I remember how odd it was that I had a client supposedly confess to capital murder and a client be a victim of a capital murder all in the one weekend. It wasn't a good weekend needless to say, but it was the same weekend as that murder. So like I said, Mr. Weeks had called me about that also so he was just full of good news that evening. But he did contact me at home and let me know what transpired with Raymond.
Q Do you have any idea what time this was Sunday evening?
A It was, you know, 8:00; 9:00 o'clock, somewhere in the later part of the evening. It was dark; I remember that.
Q This is the evening of the 12th, Sunday evening?
A Yes, sir.
Q Okay. And prior to this no one had contacted you?
A Certainly no one had contacted you while Raymond Cobb

was being interviewed in the early morning hours of the 12th?

A No.

Q In Odessa by Sergeant Thomas and Corporal Sikes?

A No.

Q And when was your next contact concerning—When is the next time anyone contacted you after Mr. Weeks contacted you on the evening of the12th?

A Well, I went out and saw Raymond in the jail I'm going on to say the very next—well, Monday and tried to find out what was going on and got his story. And I believe I talked with Haley and James a little bit. In fact Judy asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that you know, that decision hadn't been made to my knowledge yet, but we talked a little bit. And I met with Raymond and kind of went over, you know, what had transpired and eventually got a copy of his initial statement, the one that's in evidence now, kind of went over that with him somewhat.

Q All right.

A And then I was contacted the next evening, and I thought—it may have been James that called me, but I thought it was David Weeks that asked me if Raymond could go out there and. . .

Q Again?

A Yeah. This would have been the next night, and asked if Raymond could go out there or if I had any objections to him going out there with Haley and James. And then he left me—I think he left me the number to call James directly and contact her. I think that's how that went because for some reason I almost want to swear that I was—I had talked to him first about it. And I told him, "Well, you know, I don't know what else he could tell you," but I did not deny

them permission to take him out there.

And then I remember the next time—I was called again that next night by David and said I needed to get out to the jail because Raymond was having some problems and was having some—apparently some emotional problems. And I know that was the 14th because that's the day his son was born.

And so he—And I went out there. And eventually I saw Judy out there, and she arranged for a phone call between he and his girlfriend so that he could talk to her and it seemed to help the situation some, and that was kind of the sequence of events. And ultimately I was appointed to represent him, and after that I pretty much—well, after that I pretty much cut off any more contact that he had with law enforcement at that point in time.

Q To the best of your knowledge he has not had any further contact?

A Shouldn't have had after the 14th. If he did, it was without my permission.

Q Is there anything else you would like to add, Mr. Ridley, that I may have failed to ask you?

A No. I think that's kind of a sequence of events from when I initially got involved. I don't know when my official appointment was here, but I know I talked with Judge McAdams about it; talked with Mr. Weeks about it, and I wanted to talk to you about it, also, to see if you would be interested in being involved.

Q And as his lawyer you understand that you represented him prior on the burglary charge, and these capital murder charges also stem from the same transactional basis as the burglary that you were appointed to represent him on?

A I understand that very well, yes.

Q For the record, we're not talking about two completely separate incidents here?

A No, this is exactly the same incident.

MR. GREEN: Pass the witness.

CROSS EXAMINATION

BY MR. WEEKS:

Q Mr. Ridley, as I recall on the night of Sunday the 12th I, David Weeks, contacted you at home that night?

A That's correct.

Q And you were informed at that time of the confession and the arrest. Would your response—Was your response at that time that "I represent him on the burglary, not on the capital murder?"

A I'm not going to deny that I said that because I think I said that more than once. Because I specifically told Judy James I wasn't sure that I was going to be involved on the capital murder case as late as two days later.

Q I think we had a discussion about that considering the circumstances that I wanted you to know about it?

A That's correct.

Q And that probably until such time as we could get somebody appointed it would probably be good for you to help him out?

A You did say that. You indicated that I should go see him, yes.

Q And your appointment on the capital murder came sometime later?

A Yes.

Q The calls that were made to you concerning Raymond Cobb's contact with law enforcement. . .

THE COURT: I'm sorry, David, just a second. The first time you were contacted during the final round—in other words,

from Odessa to when it all stopped was when they wanted to the take him out there the last time?

THE WITNESS: The time that Detective Haley—when he was talking about the incident with the baby. That was the time they asked, you know, to take him out there.

BY MR. WEEKS:

Q The first time you were contacted was the night following his return from Odessa, that very night?

A Right.

Q Were those contacts and the contact to you on Sunday night, would you consider those courtesy contacts?

A Well, I mean that's kind of hard to say. I felt like you were trying to let me know that, you know, a client that I had was, you know—I felt it was a little more than a courtesy. I thought that—I think, yes, it was a courtesy, but I mean I think I would have thought that you were concerned about, you know, him being represented and things of that nature. I have never know you to not want somebody to have a lawyer when they were in trouble. But, yes, I would say it was a matter of courtesy and information since I was kind of the—You know, things had taken—I would say probably an understatement—a drastic turn of events.

Q And as far as there had been a confession to the burglary case?

A You didn't hide anything from me. You pretty much told what had all gone on.

Q Okay. Thank you, Mr. Ridley.

MR. WEEKS: Pass the witness.

REDIRECT EXAMINATION

BY MR. GREEN:

Q Mr. Ridley, if you had been contacted by David Weeks or Judy James at 2:39 in the morning and informed by them that your client, Raymond Cobb, was under arrest for capital murder based on an oral statement he gave his father, would you have allowed law enforcement personnel to interview Raymond Cobb?

A Not in a million years.

Q Would you repeat that?

A Not in a million years. I would have been on the phone to Judge McAdams finding out what we could do about it, but I would not under any circumstances have allowed it.

Q Would you have allowed him to consent to a search of his residence?

A Consent—I would have told him not to say anything, or do anything, or sign anything.

Q Would you have demanded immediate access to your client, at least telephonically?

A Yes, because I would have wanted to speak to him directly.

MR. GREEN: No further questions.

RECROSS EXAMINATION

BY MR. WEEKS:

Q Of course, your client's right to counsel is his privilege to invoke, is it not?

A I would agree with that.

Q Thank you.

MR. WEEKS: Pass the witness.

MR. GREEN: Nothing further. The defendant has no further witnesses, Your Honor, or evidence to present at this hearing.

APPENDIX C

[Excerpt from trial proceedings held on February 19, 1997]

[R 17:15-16]

THE COURT:

Mr. Cobb, would you please stand, sir? Mr. Weeks, you may present the indictment.

MR. WEEKS:

In the name and by the authority of the State of Texas the Grand Jury in and for the County of Walker, State of Texas, duly selected, impaneled, sworn, charged, and organized as such at the July term A.D. 1995, of the District Court for said county upon their oath present in and to said Court at said term that Raymond Levi Cobb, defendant, on or about the 27th day of December A.D. 1993, and before the presentment of this indictment in the county and state aforesaid did then and there intentionally and knowingly cause the death of an individual, namely Margaret Owings, by stabbing her with a knife and by manner and means unknown to the Grand Jury, and did then and there intentionally and knowingly cause the death of another individual, namely Kori Rae Owings, by suffocation and by manner and means unknown to the Grand Jury, and both murders were committed during the same criminal transaction. Against the peace and dignity of the State. Signed by J.T. Langely, Foreman of the Grand Jury.

THE COURT:

Thank you, Mr. Weeks. Mr. Cobb, what is your plea, sir?

MR. RIDLEY:

Judge, on advice of counsel Mr. Cobb stands mute.

THE COURT:

Then will you enter the plea for him?

MR. RIDLEY:

The Court can take notice — How we will proceed, I assume, is — I guess the Court will enter a plea of not guilty for him.

THE COURT:

If that's your request then, yes, sir, I will. Thank you, and at this time, Mr. Weeks, you may give an opening statement.

MR. WEEKS:

Thank you, Your Honor.

APPENDIX D

[Findings of Fact and Conclusions of Law filed October 29, 1997]

[Supp. R 1:1-4]

CAPTION

THE STATE OF TEXAS
COUNTY OF WALKER

At a regular term of the 12th Judicial District Court begun and holden within and for the County of Walker, and the State of Texas, before the Honorable William L. McAdams Judge, thereof presiding, which term began on the 1st day of January, 1997, and which term adjourned on the 30th day of June, 1997, the following cause came on for hearing, to wit:

THE STATE OF TEXAS NO. 18,920

VS

RAYMOND LEVI COBB

CHARGE: CAPITAL MURDER

WILLIAM L. MCADAMS

Presiding Judge

12TH Judicial District Court

Walker County, Texas

NO. 18,920

RAYMOND LEVI COBB, § IN THE DISTRICT COURT OF'
Appellant

VS. § WALKER COUNTY, T E X A S

STATE OF TEXAS § 12TH JUDICIAL DISTRICT
Appellee

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 18th day of December, 1996, this Court entered an Order denying defendant Raymond Levi Cobb's motions to suppress evidence in the above styled and numbered cause of action, and the attorneys for the defendant have requested the Court enter findings of fact and conclusions of law in support of the Court Order denying the defendant's motions to suppress State's evidence in this cause, accordingly, the Court makes the following findings of fact and conclusions of law.

1. Raymond Levi Cobb's November 11, 1995, oral confession to Charles Cobb that he had killed Margaret Owings and that Kori Rae Owings was dead was not a result of custodial interrogation.

2. On November 11, 1995, Charles Cobb was not acting as an agent of any law enforcement agencies when he confronted Raymond Levi Cobb about the disappearance of Margaret Owings and Kori Rae Owings.

3. Raymond Levi Cobb signed a written consent to search on November 12, 1995, and allowed Detective Vic Sikes and

Sergeant Harold Thomas to search his Odessa apartment.

4. Raymond Levi Cobb knowingly and intelligently signed a written consent to search on November 12, 1995, and voluntarily allowed Detective Vic Sikes and Sergeant Harold Thomas to search his Odessa apartment.

5. The wedding band of Margaret Owings recovered by Detective Vic Sikes and Sergeant Harold Thomas from Raymond Levi Cobb's Odessa apartment was voluntarily given to Sergeant Harold Thomas by Raymond Levi Cobb and was not a result of a search.

6. Knives recovered by Charles Cobb from Raymond Levi Cobb's Odessa apartment were not the result of a search and Charles Cobb had permission to be in the apartment and Charles Cobb was not acting as an agent for any law enforcement agencies.

7. The evidentiary search warrant issued by Judge Bill McCoy of the 358th District Court of Ector County was valid and the evidence resulting from the search of Raymond Levi Cobb's Odessa apartment on November 13, 1995, by Detective Vic Sikes and Sergeant Harold Thomas was properly obtained and admissible.

8. Raymond Levi Cobb was read his Miranda warnings by Odessa Police officers Vic Sikes and Harold Thomas, and was magistrated at the Jail in Odessa on November 12, 1995, and was magistrated in Walker County by Judge John Pasket on that same day. Raymond Levi Cobb acknowledged that he understood those rights, waived those rights and voluntarily took officers to the area where the remains of Margaret Owings and the clothing of Kori Rae Owings were found. Raymond Levi Cobb never invoked his right to counsel at any time.

9. Attorney Hal Ridley was appointed by the District Court of Walker County to represent Appellant for a burglary in Cause No. 18,260 that occurred in Walker County on or about December 26, 1993, with such appointment occurring on August 15, 1994;

10. The burglary in question for which Appellant was indicted by the Walker County grand jury was the same matter for which Appellant was subsequently indicted by the Walker County grand jury in the second paragraph of the indictment for the offense of capital murder, the burglary for which Appellant was being represented by Attorney Ridley from August, 1994;

11. This Court finds, however, that under the facts and circumstances of this case, the written confession taken from the Appellant was given voluntarily, and was admissible in this trial against the Appellant under the provisions of Article 38.22, Texas Code of Criminal Procedure and all other relevant state and federal case law and statutes, and the Texas and U.S. Constitutions.

12. The burglary charged against Appellant, for which Attorney Ridley had been appointed, was still pending and had not been disposed of by the date that the subsequent written confession was given by appellant on November 12, 1995, and thus, Attorney Ridley was still counsel of record for Appellant on this burglary charge on November 12, 1995.

13. Raymond Cobb was tried for Capital Murder as alleged in the first paragraph of the indictment for the murders of Margaret Owings and Kori Rae Owings during the same transaction, and not the second paragraph of the indictment which was abandoned before trial.

14. Appellant had been a suspect in this burglary in late December, 1993, as the appellant had been interrogated by police officers in Walker County and had given a written statement to officers at that time, and furthermore, Appellant gave a written confession on July 15, 1994 to Walker County law officers, admitting that he committed this burglary.

15. Attorney Ridley testified that, as a result of assurances by Walker County law enforcement officers that Appellant was not a suspect in the missing persons case involved herein, he allowed Appellant to discuss this case with officers, without his presence, since he relied upon the representations of the law enforcement officers that Appellant was not a suspect in this capital murder case. Mr. Ridley never informed law enforcement not to talk to Raymond Cobb without his presence.

16. Mr. Ridley testified that, at all times, he was under the impression that another person was the true suspect for this missing person/murder case, that person being one Tim Root, and Mr. Ridley relied on these representations by law enforcement.

17. It was not until late September, 1995, that counsel Ridley was informed by Sheriff Myers that Appellant was a suspect in the disappearance, and at that time, Appellant was residing in Odessa, Texas, after he had been released on bond from the previous burglary charge.

18. Mr. Ridley testified that when law enforcement officers arrested Appellant, in Odessa, Texas, on the morning of November 12, 1995, he was not notified of that arrest, nor was he ever notified that Appellant was being brought back to Walker County for further interrogation until after Appellant had given his written confession and had led officers to the bodies of the deceased, providing oral confessions that became admissible during

the trial, under Article 38.22, Sec. 3(c), V.A.C.C.P.;

19. Attorney Ridley testified that he had previously informed Appellant that should any law enforcement officers question him, without notifying counsel in advance, that he should inform them to contact him, as he was counsel of record, and Mr. Ridley further indicated that he gave this advice to both Appellant and to Appellant's father in June, 1995, prior to the taking of this confession in this case.

20. Raymond Levi Cobb did not request an attorney at any time before, during, or after the November 12, 1995, interviews with Detective Vic Sikes and Sergeant Harold Thomas of the Odessa Police Department.

21. Mr. Ridley testified "had he known that Appellant was under arrest for Capital Murder he would not have allowed law enforcement personnel to interview Appellant in a million years", and had he been informed as to Appellant's arrest, he would not have allowed Appellant to talk to the officers about the murder case;

22. This Court finds that is undisputed that Attorney Ridley was not contacted by Walker County law enforcement when Appellant was brought back to Huntsville from Odessa, and was not notified about the confessions given by Appellant until the 12th of November 1995, during the late afternoon or evening hours;

23. Hal Ridley was appointed in August, 1994, to represent Raymond Levi Cobb on indictments charging Raymond Levi Cobb with Delivery of Marihuana and Burglary of a Habitation. Hal Ridley testified he was not Raymond Levi Cobb's attorney on the Capital Murder of Margaret Owings and Kori Rae Owings on November 11, 12, and 13, 1995.

24. The police officers in Odessa, Texas did not know that Appellant was represented by counsel Ridley in this previous burglary case, and there is no evidence to show that the Walker County Justice of the Peace Pasket, who gave Appellant his Miranda warnings on November 12, 1995 at 9:19 a.m., had been informed that attorney Ridley had been representing Appellant on this burglary case from 1993.

25. Raymond Levi Cobb was arrested on a complaint for Capital Murder alleging he killed Margaret Owings and Kori Rae Owings during the same transaction. Raymond Cobb's written confession taken by investigator, Vic Sikes and all of the evidence obtained after the confession were not in violation of Upton v. State, 853 S.W. 2nd 554 (Tex.Cr.App.1993)

These Findings of Fact and Conclusions of Law entered on this the 28th day of October, 1997.

/s/ Williams McAdams
Judge, William McAdams

APPENDIX E

[Charge of the Court filed February 25, 1997]

[TR 1:145-152]

CAUSE NO. 18,920

THE STATE OF TEXAS	§ IN THE DISTRICT COURT
VS.	§ WALKER COUNTY, T E X A S
RAYMOND LEVI COBB	§ 12TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant, Raymond Levi Cobb, stands charged by indictment with the offense of capital murder, alleged to have been committed in Walker County, Texas on or about the 27th day of December, A.D. 1993. To this charge the defendant stood mute on advice of counsel and therefore the Court has entered a plea of not guilty on his behalf.

You are instructed that you will consider only the guilt or innocence of the defendant from the evidence admitted before you and from the law as given to you in this charge by the Court. You are instructed that the law applicable to this case is as follows:

1.

Our law provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual.

A person commits the offense of capital murder if he commits murder as defined above and he murders more than one

person during the same criminal transaction.

2.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Individual" means a human being who has been born and is alive.

"Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed, which passion arises at the time of the alleged offense and is not solely the result of former provocation.

"Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

3.

Now, bearing in mind the foregoing instructions, if you find from the evidence beyond a reasonable doubt that on or about the 27th day of December 1993, in Walker County, Texas, as alleged in the indictment, the defendant, Raymond Levi Cobb, did then and there intentionally murder more than one person during the same criminal transaction, to-wit: that the said Raymond Levi Cobb did then and there intentionally or knowingly cause the death of an individual, namely, Margaret Owings, by stabbing her with a knife, or by manner and means unknown to the grand jury, and the defendant, Raymond Levi Cobb, in so acting was not acting under the immediate influence of sudden passion arising from an adequate

cause, and that the said Raymond Levi Cobb did then and there intentionally or knowingly cause the death of an individual, namely, Kori Rae Owings, by suffocation, or by manner and means unknown to the grand jury, and the defendant, Raymond Levi Cobb, in so acting was not acting under the immediate influence of sudden passion arising from an adequate cause, then you will find the defendant guilty of capital murder and so say by your verdict.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether he is guilty of murder.

4.

If you find from the evidence beyond a reasonable doubt that on or about the 27th day of December, 1993, in Walker County, Texas the defendant, Raymond Levi Cobb, did intentionally or knowingly cause the death of an individual, namely; Margaret Owings, by stabbing her with a knife or by manner and means unknown to the grand jury, but you do not believe beyond a reasonable doubt that the defendant did intentionally or knowingly cause the death of Kori Rae Owings by suffocation or by manner and means unknown to the grand jury, then you will find the defendant guilty of the murder of Margaret Owings.

Unless you so find beyond a reasonable doubt or you have a reasonable doubt thereof you will acquit the defendant of the murder of Margaret Owings and next consider whether he is guilty of the murder of Kori Rae Owings.

5.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 27th day of December, 1993, in Walker County, Texas, the defendant, Raymond Levi Cobb, did intentionally or knowingly cause the death of an individual, namely Kori Rae Owings, by suffocation or by manner and means unknown to the grand jury, but you do not believe beyond a reasonable doubt that the defendant did intentionally or knowingly cause the death of

Margaret Owings by stabbing her with a knife or by manner and means unknown to the grand jury, then you will find the defendant guilty of the murder of Kori Rae Owings.

Unless you so find beyond a reasonable doubt or you have a reasonable doubt thereof you will acquit the defendant of the murder of Kori Rae Owings.

6.

If you find from the evidence beyond a reasonable doubt that the defendant is guilty of either capital murder or the murder of either Margaret Owings or Kori Rae Owings, but you have a reasonable doubt as to which offense he is guilty, then you must resolve that doubt in defendant's favor and find him guilty of the lesser offense of murder of either Margaret Owings or Kori Rae Owing's, individually.

7.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the Defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the Defendant.

8.

A grand jury indictment is the means whereby a Defendant is brought to trial in a felony case. It is not evidence of guilt nor can it be considered by you in passing upon the question of the guilt of the Defendant. The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined or indicted for, or otherwise charged with, the

offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is a kind of doubt that would make a reasonable person hesitate to act in the most important of his or her own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "not guilty."

You are the exclusive judges of the facts proved, the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your Presiding Juror. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by

using the appropriate form attached hereto, and signing the same as Presiding Juror.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

Your verdict must be by a unanimous vote of all members of the jury. In arriving at your verdict, it will not be proper to fix the same by lot, chance, or any other method than by a full, fair and free exercise of the opinion of the individual jurors under the evidence admitted before you.

After you have retired, you may communicate with this Court in writing through the officer who has you in charge. Do not attempt to talk to the officer, the attorneys, or the Court concerning any question you may have. After you have reached a unanimous verdict, the Presiding Juror will certify thereto by using the appropriate form attached to this charge and signing his or her name as Presiding Juror. You may now retire to consider your verdict after argument of counsel.

/s/ William McAdams
William McAdams, Judge Presiding

Date: February 25, 1997

No. 18, 920

THE STATE OF TEXAS § IN THE DISTRICT COURT

VS. § WALKER COUNTY, T E X A S

RAYMOND LEVI COBB § 12TH JUDICIAL DISTRICT

VERDICT SHEET

We, the Jury, find the Defendant, Raymond Levi Cobb, guilty of the offense of Capital Murder as charged in the indictment.

/s/ Phillip Townsend
Presiding Juror

OR

We, the Jury find the defendant, Raymond Levi Cobb, guilty of the murder of Margaret Owings.

_____
Presiding Juror

OR

We the jury find the defendant, Raymond Levi Cobb, guilty of the murder of Kori Rae Owings.

_____
Presiding Juror

OR

We, the Jury, find the Defendant, Raymond Levi Cobb, not guilty.

_____
Presiding Juror

Date: February 25, 1997

APPENDIX F

[Judgment and Sentence on Plea of Not Guilty Jury Trial filed February 27, 1997]

[TR 1:158-162]

NO. 18, 920

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
VS.	§	WALKER COUNTY, TEXAS
RAYMOND LEVI COBB	§	12TH JUDICIAL DISTRICT

JUDGMENT AND SENTENCE ON PLEA OF NOT GUILTY
JURY TRIAL

Judge Presiding: William McAdams

Date of Judgment: February 27, 1997

Attorney for State: David P. Weeks and John R. Gaines
Attorney for Defendant: Hal Ridley and Bruce Green

Offense Convicted of: Capital Murder
Date Offense Committed: December 27, 1993
Degree: Capital

Charging Instrument: Indictment
Plea: Not Guilty entered by the Court

Plea to Enhancement Paragraph(s) : n/a
Findings on Enhancement: n/a

Finding on Use of Deadly Weapon: n/a

Date Sentence Imposed: February 27, 1997
Costs: $

Punishment and Place of
Confinement: DEATH/TDCJ-ID
Date to Commence: 2/27/97 Time Credited:

Total Amount of Restitution/Reparation: N/A
Restitution to be paid to:
Name: N/A
Address:

Concurrent Unless Otherwise Specified.

THE STATE OF TEXAS VS. RAYMOND LEVI COBB
CAUSE NO. 18,920
PAGE 2

On the 19th day of February, 1997, this cause was called for trial, and the State appeared by her District Attorney, and the defendant, Raymond Levi Cobb, appeared in person in open court, his counsel, Hal Ridley and Bruce Green, also being present, and the said defendant having been duly arraigned, the defendant stood mute on advice of counsel and therefore the Court entered a plea of not guilty on his behalf to the charge contained in the indictment herein, both parties announced ready for trial, and thereupon a jury was selected and seated consisting of Phil Townsend (foreperson) and eleven others who were duly sworn. Thereupon the indictment was read and the court entered a plea of not guilty for the defendant to the following charge contained in the indictment and read to the jury by the State: Capital Murder.

All of the evidence was presented by both the State and the Defendant and the charge was read to the jury by the court and thereupon the jury heard the arguments of both sides and retired in charge of the proper officer to consider of their verdict and afterward were brought into open court by the proper officer, the defendant and counsel being present, and returned the following verdict which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

We, the jury, find the defendant, Raymond Levi Cobb, guilty of the offense of capital murder, as alleged in the indictment.

/s/ Phillip Townsend
Foreperson of the Jury

THE STATE OF TEXAS VS. RAYMOND LEVI COBB
CAUSE NO. 18,920
PAGE 3

And on this the 26th day of February A.D. 1997, this cause being again called, the State appeared in person, his counsel also being present, and the same jury being called to assess the punishment, evidence was presented to the same jury in the matter of assessing punishment. The same jury after hearing all the evidence presented by the State and the defendant for the purpose of assessing punishment, and after having heard argument of counsel, again retired in charge of the proper officer to consider of the verdict, and afterward were again brought into court by the proper officer, the defendant and his counsel being present, and the jury returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt there is a probability that the defendant, Raymond Levi Cobb, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER TO SPECIAL ISSUE NO. 1

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Phillip Townsend
Presiding Juror

SPECIAL ISSUE NO. 2

Do you find from the evidence, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER TO SPECIAL ISSUE NO. 2

We, the Jury, unanimously find that the answer to this Special Issue is "No."

/s/ Phillip Townsend
Presiding Juror

We, the Jury, having answered the foregoing issues, return the same into court as our verdict.

/s/ Phillip Townsend
Presiding Juror

It is therefore CONSIDERED and ADJUDGED by the Court that the defendant, Raymond Levi Cobb, is guilty of the offense of Capital Murder as found by the jury, and the jury having further answered

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

We, the Jury, unanimously find that the answer to this Special Issue is "No"; and the law providing that on such jury finding the Court shall assess the death penalty to the defendant.

It is, therefore, the Order of the Court that the defendant be punished by having the death penalty assessed against him.

Thereupon the Defendant, Raymond Levi Cobb, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of said Defendant, Raymond Levi Cobb, to pronounce sentence against him as follows:

Whereas, the Defendant has been adjudged to be guilty of capital murder by the jury and the jury having further answered

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

We, the Jury, unanimously find that the answer to this Special Issue is "No;" and the law providing that on such jury finding the Court shall sentence the Defendant to death.

It is, therefore, the ORDER of the Court that the Defendant is sentenced to death; but the law further providing for an automatic appeal to the Court of Criminal Appeals of the State of Texas, the sentence is suspended until the decision of the court of Criminal Appeals has been received by this Court.

The Defendant is now remanded to the custody of the Sheriff of Walker County, Texas, to be transported to the Institutional Division of the Texas Department of Criminal Justice at Huntsville, Texas, there to await the action of the Court of Criminal Appeals and the further orders of this Court.

Entered this the 27th day of February, A.D. 1997.

/s/ William McAdams
JUDGE PRESIDING

Supreme Court, U.S.
FILED
JUN 7 2000
CLERK

No. 99-1702

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

THE STATE OF TEXAS
Petitioner

v.

RAYMOND LEVI COBB
Respondent

* * * * *

On Petition For Writ Of Certiorari
to the
Texas Court of Criminal Appeals

* * * * *

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RESPONDENT'S BRIEF IN OPPOSITION

(CAPITAL CASE)

* * * * *

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QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan vs. Jackson*, 475 U.S. 625 (1986) and *Patterson vs. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine vs. Moulton*, 474 U.S. 159 (1985), and *McNeil vs. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony question? Of

III.

If the court decides in *Dickerson vs. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson* -- which grafted *Miranda* and *Edwards vs. Arizona*, 471 U.S. 477 (1984), into the Sixth Amendment context, constitutionally required a result in this case?

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No. 99-1702

IN THE
UNITED STATES SUPREME COURT

STATE OF TEXAS
Petitioner
v.
RAYMOND LEVI COBB
Respondent

Respondent , RAYMOND LEVI COBB, respectfully requests that the Court deny the State of Texas Petition for Writ Of Certiorari to review the judgment of the Texas Court of Criminal Appeals, ordering that the conviction be reversed for a new trial in his case. In the alternative, Mr. Cobb requests that the Court grant review and summarily affirm the decision of the court below.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals, *Cobb v. State*. No. 72,807, is not yet reported, as a Stay Of Mandate has been granted pending review by this Honorable Court.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked by the State of Texas in this case pursuant to Title 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner State of Texas contends that, under the Sixth and Fourteenth Amendments to the United States Constitution, the Court Of Criminal Appeals interpretation of the law is incorrect, thus seeking review by this Court.

STATEMENT OF THE CASE

The Respondent was indicted by a Grand Jury in Walker County, Texas, for the offense of capital murder, and after a trial in this case in February, 1997, Respondent was convicted and assessed the death penalty. On mandatory appeal to the Texas Court Of Criminal Appeals, the case was docketed as Cause No. 72,807, and after briefs were filed and oral argument was presented, the Court Of Criminal Appeals handed down an opinion on March 15, 2000, ordering the conviction reversed and remanded for a new trial. No Motion For Rehearing was filed.

However, the Texas Attorney General's Office was requested to intervene in this matter on behalf of the District Attorney of Walker County, and the Texas Attorney General has filed a Petition for Writ Of Certiorari in this Court.

STATEMENT OF FACTS

Prior to trial, Respondent filed several motions complaining of the inadmissibility of his written and oral confessions (D.C.R. 63 – 64; 84 – 85; 87 -- 92). Hearings were held by the trial court on the admissibility on the confessions and other evidence seized as a result of the arrest of Respondent. See Court Reporter's Record, Volumes 2 and 3. Throughout the trial, counsel for the Respondent objected on dozens of occasions to evidence seized and statements made by Respondent as a result of his arrest on Nov. 12-13, 1995.

The trial court's findings of fact with regard to the admissibility of this written and oral confessions or reproduced within the Appendix of the Petitioner. See Appendix D, pg. 2-7. Counsel for Respondent believes that the Petitioner's statement of the case is generally sufficient for the purposes of this review process.

SUMMARY OF ARGUMENT

The Respondent submits that in Question No. 1 of this Petition for Writ Of Certiorari the Petitioner (State) is attempting to request this Court to dramatically change/overrule all the law as interpreted by its previous Sixth Amendment decisions and vastly limit the present "*Bright Line*" rules set out by this Court to protect citizens from being overborne, coerced or tricked into waving the right to counsel that had *already attached* to cases pending against them. Cf. Brewer vs. Williams, 430 U.S. 387 (1977) , Edwards vs. Arizona, 451 U.S. 477 (1984), Michigan vs. Jackson, 475 U.S. 625 (1986).

Respondent submits that such drastic action requested by Petitioner is without necessity or need based upon the facts of this case. Petitioner also submits that there is substantial confusion in the courts over the interpretation of Michigan vs. Jackson, supra, but Respondent disagrees, noting that this Court and the Nation's lower courts, both State and Federal, have consistently applied these "right to counsel" protections. See; Powell v. Texas , 492 U.S. 680; Michigan v. Harvey, 494 U.S. 344; Minnick v. Mississippi, 498 US 46; Moran v. Burbine, 106 S.Ct. 1135.

With regard to Question No. 2, the Petitioner apparently seeks to have this court expand the *limitations* on the right of counsel that were suggested in McNeil vs. Wisconsin, 501 U.S. 171 (1991), wherein this Court held that, if there were a separate criminal charge arising against a defendant, even if that defendant had counsel in a previous *unrelated* criminal case, the Sixth Amendment counsel protection did not extend to the second, separate case.

However, it is submitted that this Court dealt with that issue in Maine vs. Moulton, 474 U.S. 159 (1985), where this Court found a Sixth Amendment violation when the government interfered with the right of

counsel, after the defendant had an attorney, in the police efforts to allegedly investigate "other crimes". Since the crimes in that case were all interrelated out of the same conspiracy transactions, this court found that the justifications for admissibility were insufficient. In McNeil vs. Wisconsin, supra, this Court had an opportunity to limit Moulton, or overrule it, but did not.

The Petitioner contends that a grant of certiorari is necessary to settle the law in this regard, but Respondent would submit that there is a wealth of cases, from States all across the Union and the Federal Courts, and most specifically the United States Court of Appeals for the Fifth Circuit in which Texas is situated, which have interpreted this Court's previous decisions in a manner consistent with Respondent's arguments. The Petitioner recognizes these authorities. See Petition For Writ Of Certiorari, pp. 21-26. In fact, the Petitioner *concedes* that this Court's decision in Moulton stands for the proposition "that the Sixth Amendment attaches to certain offenses that are *uncharged but factually related to the charged offense*." See Petition For Certiorari, p. 22.

The Petitioner then suggests, at Certiorari Petition at p. 27, that this Court should "clarify the parameters of the factual circumstances under which the right of counsel would apply to related offenses." However, Respondent would submit that, *in this case*, there can be no factual separation of the offenses involved in the instant matter, thus no grant of certiorari jurisdiction is necessary.

With regard to Question No. 3, concerning the pendency of the decision by this Court in United States vs. Dickerson, No. 99-5525, Respondent herein will not even attempt to Reply to such theoretical and *conditional* Question based upon a decision not yet rendered by this Court. That would merely be a waste of the Court's time, in our opinion.

Respondent would also submit that the issue in the case at bar deals with a violation of the "right to counsel", which has already attached, thus any decision in Dickerson which would change the present application of the "*Miranda*" rule would have little bearing upon the merits of this case.

However, in the event that the decision of this Court in Dickerson is decided before the Court rules on the Certiorari Petition in this case, counsel for Respondent would request leave, at that time, to respond to this *Conditional* Question as posed by petitioner.

REASONS FOR DENYING THE WRIT

QUESTION 1

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan vs. Jackson*, 475 U.S. 625 (1986) and *Patterson vs. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

Introduction

Because counsel for Respondent believes that the decision by the Texas Court Of Criminal Appeals has little, if any, application to this question, counsel for Respondent will not spend a substantial amount of time dealing with responding to this instant Question.

ARGUMENT AND AUTHORITIES

As counsel understands this "Question" as posed by Petitioner, the entire Question is based upon a defective premise from the outset. The petitioner frames the question in light of a previous "*assertion*" of the right

to counsel by Respondent some 1 1/2 years earlier, a factor that Respondent does not believe is *constitutionally* relevant.

In this case, the Respondent was arrested, indicted, requested counsel, and received the appointment of counsel based upon the burglary offense of the victims' home, and thereafter, the investigation by law enforcement continued for the following two years, from December, 1993 until the arrest of Respondent in November, 1995.

Attorney Ridley was appointed for Respondent in August, 1994, and maintained that *attorney-client relationship* with the Respondent throughout all relevant time periods of the state's investigation of the burglary and disappearance of the victims, and the eventual arrest of the Respondent, all the way through the motion for new trial proceedings after Respondent had been convicted.

The Petitioner takes the position, apparently, that Respondent's mere "assertion of counsel" at some time prior his indictment for the burglary is the *critical factor* for this Court to review. Respondent disagrees, because, simply put, it was not merely an "assertion" by Respondent that was involved, but rather, a full blown, on *going attorney-client relationship* that had been formed and continued between Respondent and his counsel, and continues to this day. Once the Court appointed counsel for the Respondent, and especially after the *attorney-client relationship* was fully formed, any claim that this is a "mere assertion" Question would appear to be without merit.

Thus, as a factual matter, we are not talking about a *mere* assertion by Respondent of his rights to law enforcement agents, but rather, what is involved is a full-blown violation and infringement upon the **on-going** *attorney-client relationship* formed between Respondent and his counsel. See Massiah v. United States, 377 U.S. 210; United States v. Henry, 447 U.S. 264 (1980); Spano v. New York, 360 U.S. 315 (1959).

We submit that this distinction, where the state law enforcement agents "invaded" the on-going *attorney-client relationship,* with counsel recognizing from the outset that Respondent was a potential "suspect" in the victims "disappearance", clearly distinguishes this situation from a *mere assertion* type case, as generally recognized by the Fifth Amendment.

The Court Of Criminal Appeals concluded that this was a violation of the *attorney-client relationship*, thus violating the Sixth Amendment right to counsel. Under the circumstances, Respondent would submit that this Question is without merit based upon long-standing Supreme Court authority, and that this issue for review should be denied certiorari consideration.

QUESTION 2

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine vs. Moulton*, 474 U.S. 159 (1985), and *McNeil vs. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony question?

Introduction

Respondent submits that the law and authorities from this Court clearly indicate that the decision of the Texas Court Of Criminal Appeals on this issue is constitutionally valid and meets the standards set out by this Court in Moulton, supra and McNeil, supra.

Respondent further cannot see the need for granting of certiorari where the principles set out by this Court are being fairly and appropriately applied to these unusual fact situations across the country.

ARGUMENT AND AUTHORITIES

In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Court was confronted with a fact situation in which the defendant was arrested on one offense and after requesting and being given counsel, thereafter, law enforcement officers interrogated the defendant about *separate* and *distinct* crimes without notifying the defendant's original attorney. The Court, in dealing with whether there was 6th Amendment violation, held:

> "Our holding in Michigan v. Jackson, 475 U.S. 625 (1986), does not, as petitioner asserts, contradict the foregoing distinction; to the contrary, it rests upon it. That case, it will be recalled, held that after the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible. The State in Jackson opposed that outcome on the ground that assertion of the Sixth Amendment right to counsel did not realistically constitute the expression (as Edwards required) of a wish to have counsel present during custodial interrogation. See 475 U.S., at 632-633. Our response to that contention was not that it did constitute such an expression, but that it did not have to, since the relevant question was not whether the Miranda "Fifth Amendment" right had been asserted, but whether the Sixth Amendment right to counsel had been waived. We said that, since our "settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel, . . . we presume that the defendant requests the lawyer's services at every critical stage of the prosecution." 475 U.S., at 633 (emphasis added). The holding of Jackson implicitly rejects any equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger Edwards. If such invocation constituted a real (as opposed to merely a legally presumed) request for the assistance of counsel in custodial interrogation, it would have been quite unnecessary for Jackson to go on to establish, as it did, a new Sixth Amendment rule." (emphasis supplied)

The McNeil Court concluded that, where there were *separate* and *distinct* offenses involved, even where the right to counsel had attached to one of those offenses, the defendant's rights to counsel did not automatically attach to the other crime, under the *Sixth Amendment* protections.

Thus, the question then becomes whether or not the crimes involved herein resulted in the *Sixth Amendment* right to counsel attaching to all related offenses arising out of the exact same criminal transaction.

The Decision in Maine v. Moulton

In Moulton, the defendant was charged with an indictment for theft, and after some investigation, law-enforcement officers "wired" his co - defendant to tape record various conversations made with Moulton after the indictment and after the attachment of the right to counsel.

The law-enforcement officers ostensibly contended that their undercover investigation was solely for the purpose of determining the validity of new crimes, i.e., whether the defendant Moulton was engaging in a pattern of retaliation and threats against potential witnesses against him, as well as committing various other felonies, including burglary and arson. Several meetings with the co--defendant were tape recorded with Moulton and these conversations concerning the instant charges of theft, *plus* additional theft charges, plus burglary and arson were utilized in Moulton's trial, resulting in multiple convictions. See Moulton, p. 163,167

The Court reversed *all* the convictions, finding that the use of statements made by Moulton the during the these surreptitious meetings with his co--defendant violated the right of counsel. While the Court

acknowledged that law-enforcement officers still may investigate other crimes, the court concluded that such justification could not to take constitutional precedence over the right of counsel, because:

> ".....the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." (citations ommitted)..... And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." Brewer v.Williams, 430 U.S. 387, 398 (1977). This is because, after the initiation of adversary criminal proceedings, "the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" Gouveia, supra, at 189 (quoting Kirby v. Illinois, supra, at 689). (emphasis supplied)

The Court stated that "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." Page 171. Thus, this Court made it clear that the government could violate the right to counsel under such circumstances where they were investigating "pending" charges after one charge had been filed. Page 179.

In concluding the Court's analysis and ordering the reversal, the Court finally dealt with the problem that would face the citizens of this Country if the Petitioner's position in this case was found to have merit. This Court noted that:

> "Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime. In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah." Pgs. 179-180 (emphasis supplied)

See also Footnote No. 15, in Moulton.

While Moulton did involve investigation of separate crimes, the Court made it clear that law-enforcement techniques that pursued their continuing investigations based upon "*alleged*" new crimes arising out of the initial crime **would not justify** the violation of the right of counsel.

There is also no doubt that the Dissenting Opinion in Moulton raised this question about whether the other offenses, i.e. other thefts, burglary, arson, attempted murder, retaliation, etc, justified the law enforcement action in this matter, as the Dissent would have held that since none of these charges were "pending" at the time of the tape recorded sessions with the defendant, that the *right of counsel* did not attach. The Majority of this Court **rejected** that argument.

Respondent contends that the letter and spirit of the decision of Moulton, therefore, would certainly prevent any violation of the right to counsel for offenses arising out of the "same criminal transaction", as occurred here. This position is justified by the decisions of other courts, as noted hereinbelow.

In United States v. Arnold, 106 F.3d 37; 1997 (3rd Cir. 1997), the Court was presented with a similar legal question as posed here, in its interpretation of Maine v. Moulton, supra, and the Court in Arnold concluded that the Constitution requires a "*related offense*" exception to

the rule of McNeil vs. Wisconsin, otherwise there would be law-enforcement abuses, stating:

> "The reasoning underlying this exception is consistent with the purposes and protections of the Sixth Amendment. When the pending charge is "so inextricably intertwined" with the charge under investigation "the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense Hines, 963 F.2d 255 at 257; see also Cooper, 949 F.2d 737 at 743. "**To hold otherwise[] would allow the [government] to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes" after questioning him without counsel present**."

Thus, the Court Of Appeals reversed in the conviction in Arnold, relying upon a long list of reliable authorities for the proposition presented. See also, United States v. Kidd, 12 F.3d 30, 32 (4th Cir. 1993), cert. denied, 128 L. Ed. 2d 352, 114 S. Ct. 1629 (1994); Hendricks v. Vasquez, 974 F.2d 1099, 1104 (9th Cir. 1992; United States v. Hines, 963 F.2d 255, 257-58 (9th Cir. 1992 ; United States v. Martinez, 972 F.2d 1100 (9th Cir. 1992); United States v. Mitcheltree, 940 F.2d 1329, 1342-43 (10th Cir. 1991; People v. Clankie, 124 Ill. 2d 456, 530 N.E.2d 448, 452, 125 Ill. Dec. 290 (Ill. 1988; State v. Tucker, 137 N.J. 259, 645 A.2d 111, 120-25 (N.J. 1994), cert. denied, 130 L. Ed. 2d 651, 115 S. Ct. 751 (1995); In re Pack, 420 Pa. Super. 347, 616 A.2d 1006, 1008-11 (Pa. 1992 ; Whittlesey v. State, 340 Md. 30, 665 A.2d 223 (Md. 1995 cert. denied, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996). Commonwealth vs. Rainwater, 425 Mass 540, 681 N.E 2d 1218 (1997).

See also citations in Certiorari Petition, pages 21-27.

It is also important to note that the United States Court of Appeals for the Fifth Circuit was the source of part of Respondent's arguments in the Texas Court of Criminal Appeals. See United States v. Carpenter, 963

F.2d 736 cert. denied, 506 U.S. 927, 121 L. Ed. 2d 269,113 S. Ct. 355 (1992); United States v Cooper, 949 F.2d at 743.

From Respondent's review of the decisions, it appears that there are a number of *factors* which are relevant to determine whether the two offenses involved should be considered so "***closely intertwined, related, involved or merged***", so as to require the attachment of the Sixth Amendment protections to other offenses, where a defendant has counsel on one said offense.

Respondent will now review some of the *Factors* mentioned in the case law authorities for determining this "merger", as they apply to the instant situation:

1. Time of the Events -- It is without doubt, as found by the trial court, that the burglary offense occurred *contemporaneous* with the murder of Margaret Owings and her child,

2. Place of Events -- Of course, the burglary occurred at the location where the homicidal conduct commenced, according to the confession of Respondent, and it is clear that all the elements of the capital murder case were proven through the confession of Respondent , who indicated that the murder of Margaret Owings occurred in the victim's home.

3. The Identity of the Victim – Respondent's burglary indictment listed Lindsey Owings, the husband of Margaret Owings, as the complainant in that case, but that was clearly a necessary pleading on behalf of the state, as at the time of that indictment, Mrs. Owings was still missing, thus the state would not have had a complainant had they listed her as the owner in that indictment ; however, it is clear that since the Owings' both had Texas *community property* ownership and possessory

rights to the home, and that under Texas law Mrs. Owings could have been listed as the complaining witness in a that burglary case.

4. Nature Of The Charges -- In Count I of the indictment, Respondent was charged by indictment with the offense of Capital Murder by committing the offense of murder of two persons during the same criminal transaction. See Section 19.03 (a) (7) (A), Texas Penal Code. See Respondent's Appendix page A-1. In Count II of the indictment, Respondent was charged with burglary of the Owings home, alleging that he could also be convicted for the offense of capital murder, while in the "course of committing and attempting to commit the offense of burglary". See Section 19.03 (a) (2), Penal Code. Appendix, page A-1. Of course, Count II referred to the *exact same* burglary charge upon which Attorney Ridley was representing the Respondent.

5. Nature of the Conduct –Respondent's conduct, when he committed the burglary of the premises, was clearly related to he homicide charges, as Respondent's commission of the illegal entry into the home was the ***precipitating event*** which resulted in the murders, and was the ***clear motive*** for these killings, i.e., to escape detection for said burglary.

6. Same Law Enforcement Sovereign Agents-- The instant burglary and homicide charges both arose out of the same Texas jurisdiction, i.e., Walker County, Texas. The fact that Respondent was arrested and interrogated by detectives in Odessa, Texas, is irrelevant since these officers were following requests and instructions of members of the Walker County Sheriff's office in performing their duties in this case.

For the above reasons, Respondent submits that the decision of the Texas Court Of Criminal Appeals is consistent with the constitutional principles set out by this Court, and further consistent with the decisions of other courts across the country. In fact, Respondent would submit that the facts of this case are so clear and undisputed as to the *interrelated* nature of the initial charge and the subsequent charge, that should be no pressing need for this Court to re-review the Moulton decision at this time.

LAW ENFORCEMENT MISCONDUCT ISSUES

It is also noted that the Petitioner recognizes another exception to the rule of McNeil vs. Wisconsin, i.e., when "*there is evidence that the police have deliberately sought to circumvent an accused Sixth Amendment right to counsel*". See Certiorari Petition, p. 24.

In the instant case, the facts are undisputed that law enforcement agents in Walker County, Texas, knew that Respondent had counsel, and knew that Mr. Ridley was actively representing Respondent on these matters. On one or more occasions, agents of the state had previously contacted Ridley for permission to speak to Respondent, and that permission was given on those occasions. However, when the agents of the state knew that they were going to arrest Respondent in November, 1995, Ridley was not contacted. Why?

There is no evidence, nor any factual findings by the trial court that Ridley did, or would have, allowed law enforcement agents to talk to Respondent immediately prior to or after his November, 1995 arrest. In fact, Ridley's testimony during the suppression hearing was undisputed that he would not have given Respondent permission to talk to law enforcement, or vice versa, and this testimony found to be credible by the trial court.

Respondent submits that, in this case, just as in Massiah, Spano and Moulton, there is an indication of probable police misconduct, in that they knowingly, intentionally, and with reckless disregard for Respondent's rights to counsel, did not contact Attorney Ridley. They further failed to inform the arresting officers in Odessa, Texas, that Respondent had been *actively represented* by counsel for many months.

In Moulton, the Court recognized this problem, by stating at Page 176:

> "Beyond this, the State's attempt to limit our holdings in Massiah and Henry fundamentally misunderstands the nature of the right we recognized in those cases. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever - by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached. See Henry, 447 U.S., at 276 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent. Page 176 (emphasis supplied)

Counsel for Respondent must opine that to allow law enforcement agents to *invade* the attorney-client relationship, whether with or without advice and consent by an experienced Prosecutor, would cause *Absolute Havoc* in the criminal justice system in this country.

As the Court well recognizes, the Prosecutors and District Attorneys are well experienced in conceiving of any number of ways of ***charging***

various offenses, through claims of lesser included offenses, conspiracy theories, criminal attempts doctrines, organized criminal activity claims, etc., which all are classified as *separate offenses*, technically, for the purposes of, for example, Double Jeopardy jurisprudence.

When the on-going attorney-client relationship is formulated, as has been protected by the Sixth Amendment, the defensive strategy starts immediately being developed by his counsel whenever that citizen is initially arrested for a criminal offense. We all recognize that even though a citizen is arrested for one crime, that eventually, the prosecutor may have any number of ways in which that crime may be formally charged, or indicted, for the purposes of judicial review.

If law enforcement officers are given absolute discretion to *arbitrarily* invade the attorney-client relationship, merely because of the *hyper-technical*, formal pleading rules that may be required for *actual litigation* in court, Respondent's counsel can see the *clear and almost complete erosion* of any attorney-client relationship as protected under the Sixth Amendment. Should the recognized rule of Moulton vs. Maine be modified, to give law enforcement more authority to invade the attorney-client privilege, as the Dissenting Opinions noted in Moulton, then one can easily see that it would be fairly simple, in any case, to invade *any* attorney-client relationship, by merely having a law enforcement type/prosecutor think of any interrelated, *but uncharged,* crime which would qualify as an "*exception*", thus justifying the invasion of the attorney-client relationship.

This concept simply should not be permitted, and to even consider doing so would literally destroy all of the jurisprudence of this Court where "*Bright Line Rules*" have been formulated for the protection of the Citizenry.

It would appear to Respondent that such *probable* conduct, which would violate the letter and spirit of the "*Bright Line Rules*" sought to be enforced by this Court with regard Sixth Amendment protections, should not be considered by a grant of certiorari in this case.

TEXAS DECISION RESTS UPON ADEQUATE STATE LAW GROUNDS

Texas Joinder Practices

Respondent would also note that Texas law has certain pleading and consolidation requirements with regard to "Joinder" of various crimes, by pointing out that in Section 3.01 (a), Texas Penal Code, the definition of "Criminal Episode" means:

> "The commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances: (1) the offenses or committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan...." See Respondent's Appendix, P. A-2.

In Rios vs. State , 846 S.W.2d 310, the Court Of Criminal Appeals defined the terms "criminal transaction" and "scheme or course of conduct" with regard to capital murder cases, and held, *inter alia*:

> "Thus, in common acceptation, a criminal transaction must be understood as an act, process, or instance of carrying on or carrying out crime.....We also know, however, that "same criminal transaction" cannot be limited to conduct that violates only one statute only one time, for it takes the murder of "more than one person" under V.T.C.A. Penal Code, SS 19.02 to constitute capital murder at all, under SS 19.-03(a)(6)(A), supra.....we construed criminal transaction" to embrace facts showing "a **continuous and uninterrupted chain of conduct occurring over a very short period of time in a rapid sequence of unbroken events**.....we have said that a "transaction may be understood to be an uninterrupted and continuous sequence of events or assaultive

> acts." Rubino v. Lynaugh, 770 S.W.2d 802, at 804 (Tex.Cr.App.1989) (internal quotes omitted.... And in construing "transaction" in another statutory context, we have observed that a "criminal transaction terminates with cessation of conduct-ordinarily in a relatively brief period of time." Kalish v. State, 662 S.W.2d 595, at 600 (Tex.Cr.App.1983) (Article 28.061, V.A.C.C.P., now defunct). In reviewing sufficiency of the evidence to show "same criminal transaction," therefore, we will look to see whether the jury could rationally conclude of appellant engaged in a continuous and uninterrupted process, over a short period of time, of carrying on or carrying out murder of more than one person." (emphasis supplied)

The above emphasized language clearly reflects the interpretation by the Texas Court Of Criminal Appeals that the definition of "criminal transaction" is **very similar** to the requirements set out in Arnold, supra, Carpenter, supra, Cooper, supra, with regard to the **factors** that are necessary in proving that the offenses involved are "*intertwined, interrelated or merged*" for future interrogation purposes. In this case, without a shadow of a doubt, the offense of "burglary" was, as a matter of law and fact, totally *intertwined* with the capital murder charge as to prevent these charges from being separated for trial. See Section 3.02, Texas Penal Code (since amended). See Respondent's Appendix, p. A-2.

The Petitioner contends that a "burglary" charge was separate, but as the Court can plainly see, Count II of the indictment against petitioner charged Respondent with the Capital Murder of one of the victims *while in the course of commission of burglary*, the instant burglary involved. That is undisputed. While Petitioner contends that since Respondent was not convicted on that Count of the predicate burglary offense supporting the capital murder charge, it is obvious that at such consideration is *constitutionally irrelevant*, and that such action by the prosecution, in obtaining a Grand Jury Indictment for this instant "burglary predicate offense", clearly reflected the State's belief in the *inextricable* nature of these of crimes.

Under the facts of the instant case, there can be no doubt that the conduct committed by Respondent occurred in a single continuous transaction, which under the Joinder Laws of Texas would indicate, as a matter of our Texas law, that these offenses were *inseparable*, for the purposes of the Sixth Amendment protections. See Section 3.01-3.02, Texas Penal Code. Appendix, p. A-2.

Under the above circumstances, Respondent would submit that because Texas law has such necessary *Joinder* requirements, and because the Texas Penal Code necessarily joins the predicate offense of burglary as a predicate offense to Capital Murder, see Section 19.03 (a) (2), Penal Code, there are considerations in this case as to whether or not state law should reasonably justify denial of certiorari consideration in this matter.

Thus, because of the *Joinder* provisions of state law in Capital Cases, these offenses are, as a matter of law, *inseparable*, and where a capital murder charge arises out of the predicate offense for which a criminal defendant has counsel, there was an *Adequate State Law Ground* for ordering a reversal of any conviction that violates that right to counsel under Article I, Section 10, Texas Constitution, under those circumstances.

Respondent concedes that the Court Of Criminal Appeals did not specifically mention the Texas Constitutional or statutory provisions in their analysis for reversal, but the Texas Court Of Criminal Appeals has consistently held that the Texas Constitution and the Supreme Court's constitutional mandates should be considered in "*Lock-Step*" on "6th Amendment " issues, and for that matter. on all other constitutional concepts. See, e.g., Baker v. State, 956 S.W.2d 19; Gassaway v. State, 957 S.W.2d 49; Green v. State, 934 S.W.2d 92; Janecka v. State, 937 S.W.2d 456; Maestas v. State, 987 S.W.2d 59; Kober v. State, 988 S.W.2d 230; Hernandez v. State, 988 S.W.2d 770, etc.

It is thus the reality that the Court Of Criminal Appeals failure to consider the State Constitutional grounds in this opinion may well justify the "*adequate state law ground*" theory in this case. See Point Of Error No. 5 in Respondent's Brief before Court Of Criminal Appeals (pp. 32-47).

Texas Jury Charge- Lessor Included Offense Laws

Further, the Texas Court Of Criminal Appeals has made it clear that, in a prosecution for capital murder, where the defendant is charged a capital offense with one of the lesser "predicate offenses", such as burglary, sexual assault, kidnapping, etc, that should there be evidence warranting such a submission, the trial court *must* submit instructions on the lesser included offenses dealing with the *predicate offense*, separate and distinct from the homicide charge. See, generally, Broussard vs. State, 642 S.W.2d 171; Day vs. State, 532 S.W.2d 302; Chanslor vs. State, 697 S.W.2d 393; Bartholomew vs. State, 871 S.W.2d 210; Bignall vs. State, 887 S.W.2d 21; Jones vs. State, 984 S.W.2d 254.

As noted, in the instant case, Respondent was indicted in a multi-count indictment, with one of the counts alleging a murder while in the "course of burglary", under Section 19.03, Penal Code. Because of the various nature of crimes that constitute "*Capital Offenses*" in the State of Texas, Respondent would note that the State would have been permitted, in this case, to charge the Respondent with, at least, nine (9) different *capital crimes* had the state so desired, including murder while in the course of committing burglary (2 counts); murder while in the course of committing kidnapping (2 counts); murder while in the course of committing robbery (2 counts); the murder of a child under six years of age, and the murder of two persons during the same "criminal transaction" (2 counts, depending on which victim listed first). See Section 19.03

(*Subsections* 2, 7 and 8). See also, generally, Homan v. State, ___ S.W.3d ___ (Tex. Crim. App., No. 578-99, 5/31/00).

It is without doubt of that the "burglary" as originally charged against petitioner is considered to be a "lesser included offense" of the capital murder charge alleging the burglary as the *predicate offense* for that capital homicide. Thus, *under Texas law*, these offenses are "*inextricable*", and therefore, there is an *Adequate State Law Ground* for finding that these offenses are *inseparable*.

In conclusion, Respondent would submit:

1. Initially, the decision of the Texas Court Of Criminal Appeals is Constitutionally correct;

2. That in any event, there is no need for this Court to reconsider its previous holding in Moulton, because the decisions of the lower courts throughout the Country seem to be properly recognizing the "related offenses" exception to McNeil vs. Wisconsin;

3. Further, it is submitted that under the *facts of this case*, since there is no doubt that the predicate burglary charge and the capital homicide charge are so *intricately inseparable*, the facts of this case do not lend themselves to a grant of certiorari, and

4. Finally, Respondent would also submit that there other state law considerations involved in the facts of this case, indicating other adequate *State Law Grounds* for denying certiorari review, even though the decision of the Texas Court Of Criminal Appeals did not directly discuss those factors.

QUESTION 3

If the court decides in *Dickerson vs. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson* -- which grafted *Miranda* and *Edwards vs. Arizona*, 471 U.S. 477 (1984), into the Sixth Amendment context, constitutionally required a result in this case?

Introduction

As counsel for Respondent advised this Court in his Summary Of Arguments Section, supra, it is not felt that this Court's time is worthy of a speculative of and theoretical "*Magical Mystery Tour*" trying to analyze the various alternatives of how this Court's *future* decision in Dickerson might affect review in the instant case.

The decision of Dickerson will probably not be handed down until late in this Term Of Court, if then, and perhaps not until the October, 2000 Term of this Court, well after certiorari consideration has been given in this case.

Further, as noted, the instant case of deals solely with a Sixth Amendment violation, whereby Respondent contended, and the Texas Court Of Criminal Appeals found, that the agents of the State violated the already established *attorney-client relationship* between Respondent and his counsel. The *Miranda* decision, while having six Amendment overtones, it is primarily concerned with a violation of the Fifth Amendment guarantees, and the required notice provisions that should be given to citizens once they are arrested.

Respondent recognizes that a decision in Dickerson dealing with the interrelated concepts of the Fifth and Sixth Amendment could, conceivably, depending upon the manner and method in which the Majority Opinion is

written, have some impact on this case. However, as a general basis, the initial proposition presented in Dickerson, as to whether the special warnings required under *Miranda* have constitutional protection from Congressional Action or Amendment, should have no direct bearing upon the merits of this case.

Thus, counsel for Respondent would respectfully request this Court to grant him leave for supplementation of this Brief In Opposition to Certiorari filed by Petitioner, in the event that Dickerson is decided before the Court rules in the instant case, should Respondent feel that some of the issues there are relevant in the instant case.

In this way, counsel will be able to adequately review the Dickerson opinion, to see its proper application to the questions presented herein, rather than merely "kill trees" and "take random guesses" as to what that *future* disposition will be.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, premises, considered, Petitioner asks that this Court deny the Petition For Certiorari filed in the instant case, or in the alternative, summarily affirm the decision of the Texas Court Of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and a correct copy of the above and foregoing document was served upon Texas Attorney General, by first class mail on the 7th th of September, 2000.

ROY E. GREENWOOD

APPENDIX TO RAYMOND L. COBB BRIEF

A- 1. SECTION 19. 03, TEXAS CAPITAL MURDER STATUTE

A- 2. CHAPTER 3, TEXAS PENAL CODE, TEXAS (Joinder Statute)

SEC. 19.03. CAPITAL MURDER

(a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:

(A) who is employed in the operation of the penal institution; or

(B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;

(6) the person:

(A) while incarcerated for an offense under this section or Section 19.02, murders another; or

(B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or

(8) the person murders an individual under six years of age.

(b) An offense under this section is a capital felony.

(c) If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

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CHAPTER 3. MULTIPLE PROSECUTIONS

SEC. 3.01. DEFINITION

In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or

(2) the offenses are the repeated commission of the same or similar offenses.

SEC. 3.02. CONSOLIDATION AND JOINDER OF PROSECUTIONS

(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

(b) When a single criminal action is based on more than one charging instrument within the jurisdiction of the trial court, the state shall file written notice of the action not less than 30 days prior to the trial.

(c) If a judgment of guilt is reversed, set aside, or vacated, and a new trial ordered, the state may not prosecute in a single criminal action in the new trial any offense not joined in the former prosecution unless evidence to establish probable guilt for that offense was not known to the appropriate prosecuting official at the time the first prosecution commenced.

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

(5)

No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,
v.
RAYMOND LEVI COBB,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

In his Brief in Opposition, not only has Cobb utterly failed to explain why the Court should not grant certiorari in this case, but he has even underscored why the Court *should* grant certiorari. The State briefly replies to Cobb's arguments as follows.

I. COBB DOES NOT DENY A DEEP SPLIT IN STATE AND FEDERAL COURTS OVER THE APPLICATION OF *MICHIGAN V. JACKSON*.

The first question presented in the State's petition was whether *Michigan v. Jackson*, 475 U.S. 625 (1986), prevents an accused from unilaterally waiving his Sixth Amendment right to counsel when he has made no previous "assertion" of that right beyond accepting appointed counsel. Pet., at i, 9-20. Cobb claims he can ignore this issue, however, because he had a "full-blown" and "on-going" relationship with his appointed attorney, Hal Ridley, throughout the State's murder investigation. Opp., at 5-7. Cobb has misunderstood the State's petition.

Question one assumes that Cobb had an attorney-client relationship with Ridley,[1] but then asks whether Cobb could have unilaterally waived his right to have counsel present during police interrogation. Pet., at 9-14. The Texas Court of Criminal Appeals held that Cobb's mere "acceptance" of appointed counsel triggered *Jackson* and presumptively barred Cobb's waiver. Pet., at 9. The State contends this was wrong under *Jackson* and its progeny and, moreover, that the court's error implicates a deep split among state and federal courts. *Id.*

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1. Question one even assumes that Cobb's Sixth Amendment right to counsel had attached to the as-yet-uncharged murders. Question two of the petition, however, demonstrates that, when Cobb confessed to the murders, his Sixth Amendment right to counsel had attached only to the burglary offense. Pet., at i, 21-30.

Cobb does not dispute the existence of the split. Nor does Cobb claim that the record shows that he *ever* affirmatively invoked his right to counsel. Indeed, the record shows that Cobb voluntarily talked to police on numerous occasions outside the presence of counsel. *See* Pet., at 20. Ignoring these issues, Cobb attempts to take refuge behind his "on-going" relationship with appointed counsel.

But implicit in *Jackson* is the idea that an accused, having established a relationship with his appointed attorney, may nonetheless validly waive his right to have counsel present during an interrogation. *See Jackson*, 475 U.S. at 626 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Solem v. Stumes*, 465 U.S. 638 (1984)). The Court made this explicit when, following *Jackson*, it stated that "[n]othing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) (emphasis added); Pet., at 11 n.5. The issue here, as the Court of Criminal Appeals recognized,[2] is whether *Jackson* restricted the circumstances under which Cobb could validly waive the right to counsel. Pet., at 12-14.

Cobb's underlying position appears to be that his on-going relationship with Ridley was itself an "assertion" of his right to counsel sufficient to trigger *Jackson*. If this is Cobb's argument, he offers no authority for it. Ironically, however, the Ninth Circuit Court of Appeals issued an opinion on May 30, 2000, that superficially supports Cobb's position. *See United States v.*

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2. Incredibly, Cobb claims that the "decision by the Texas Court of Criminal Appeals has little, if any, application to this question." Opp., at 5. This is a mystifying claim, given that the court's opinion explicitly recognizes *twice* that Cobb's "assertion" of his right to counsel under *Jackson* was a pivotal issue. *See* Pet., at A-6, A-7.

Harrison, No. 99-10496, 2000 WL 684805 (CA9 May 30, 2000). In *Harrison*, the court held that an accused "invokes" his Sixth Amendment right to counsel under *Jackson* when (1) he retains counsel on an on-going basis to assist in a pending criminal investigation, (2) the government knows or should know about the representation, and (3) the government *then* indicts the defendant on "charges precisely anticipated by the scope of the pre-indictment investigation." 2000 WL 684805, at *8.

Harrison misreads *Jackson* and is wrongly decided, but that is beside the point here. At this stage, the Ninth Circuit's decision is significant because it further deepens the conflict surrounding the interpretation of *Jackson*. *See* Pet., at 14-19. *Harrison* distinguishes the Fifth Circuit's decisions in *Montoya v. Collins*, 955 F.2d 279, 283 (CA5 1992), and *Wilcher v. Hargett*, 978 F.2d 872, 874, 876 (CA5 1992), on the basis that neither case involved an accused's "affirmative act of retaining counsel." *Harrison*, 2000 WL 684805, at *5; *see* Pet., at 17-18. By drawing this meaningless distinction, the Ninth Circuit has aligned itself with cases from other jurisdictions that wrongfully equate "appointment of counsel" or a "relationship with counsel" with the "assertion" necessary to trigger *Jackson*. *See Holloway v. State*, 780 S.W.2d 787, 795 (Tex. Crim. App. 1989); *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989); Pet., at 15-16.

Far from explaining why the Court should not grant certiorari in this case, Cobb's argument shows that the conflict surrounding the application of *Jackson* has only deepened since the State filed its petition.

II. THE "CLOSELY RELATED" EXCEPTION TO *MCNEIL V. WISCONSIN* HAS NOT BEEN CONSISTENTLY DEVELOPED BY THE STATES AND THE FEDERAL CIRCUITS.

The Sixth Amendment right to counsel, as well as the *Jackson* fence around it, are "offense specific" and consequently apply only to offenses for which "adversary judicial criminal proceedings"—such as a formal charge or indictment—have been brought. *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991); Pet., at 22. Over the past decade, however, state and federal courts have developed an exception to this rule, under which the Sixth Amendment may attach to an uncharged offense if it is sufficiently "related" to a previously charged offense. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 232-26 (Md. 1995) (collecting cases). During that time, courts have expressed confusion about the degree of "relatedness" required to trigger the exception. *See, e.g., United States v. Doherty*, 126 F.3d 769, 776 (CA6 1997); *People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988). This Court has never adopted or rejected the exception, nor has it provided any guidance as to its application.

Question two in the State's petition tests the parameters of this "closely related" exception. Pet., at i. In his opposition, Cobb erroneously claims that this Court's own precedent—particularly *Maine v. Moulton*, 474 U.S. 159 (1985)—disposes of question two. Opp., at 7-11. He also mistakenly argues that lower courts' application of the exception forms a seamless web that does not merit this Court's attention. Opp., at 11-15.

Moulton addressed the government's "knowing exploitation" of the opportunity to surreptitiously interrogate a defendant outside the presence of counsel. 474 U.S., at 176; *see* Pet., at 22-23 (discussing *Moulton*). There, the government wired an informant, deliberately recorded an indicted defendant's incriminating statements, and used them at the defendant's trial on pending theft charges. 474 U.S., at 176-77. The Court held that the state violated the Sixth

Amendment by "knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Id.*, at 176.

Many state and federal courts have gleaned a "closely related" exception from a subsidiary aspect of *Moulton*. *See, e.g., United States v. Melgar*, 139 F.3d 1005, 1013 (CA4 1998). In *Moulton*, the state used the secret recording not only to bolster the pending theft charges, but also to add a burglary count to the indictment. 474 U.S., at 167. The theft charges concerned receiving stolen automobiles and parts; the added burglary charge concerned precisely the same items. *Id.* The defendant was convicted for both offenses. *Id.*

The Court reversed the convictions. *Id.*, at 180. The Court did not explicitly rule, however, that the defendant's Sixth Amendment right to counsel had attached to *both* the theft and the burglary charges. Instead, the Court simply held that use of the recorded statements to bolster the pending theft charge violated the Sixth Amendment. *Id.*, at 179-80. Significantly, the opinion is completely silent about the "relatedness" of the two charges.

Moulton's reasons for striking down both convictions are unclear. The Court seemed concerned primarily with the state's deliberate, surreptitious recording of an indicted defendant's conversation when it was certain that the defendant would incriminate himself as to the pending theft charge. *Id.*, at 176-77. The Court also may have reasoned that the improperly obtained statements incriminated the defendant for both theft and burglary. *See id.*, at 165-67. In any event, the Court's opinion contains *no* discussion of the factual or legal "relatedness" of the theft and burglary charges. Indeed, a leading case doubts whether *Moulton* gives rise to the "closely related" exception at all. *See Whittlesey*, 665 A.2d, at 233 & n.8.

Moulton does not answer question two in the State's petition. This case contains nothing like the deliberate, surreptitious circumvention of the Sixth Amendment in *Moulton*. Indeed, there is no hint of intentional police misconduct at all, and the Court of Criminal Appeals's opinion did not even address the issue. *See* Pet., at 3-6, 29; Pet., at A-7. Moreover, Cobb's murder confession *could not* have incriminated him on the burglary, because he had already confessed to it. Pet., at 28. Finally, Cobb was convicted of capital murder based on killing two persons in one transaction, and not based on burglary as a predicate felony. Pet., at 28-29. Cobb's statement, therefore, was never used against him with respect to the previously charged burglary, but only with respect to murder. Pet., at 28. In sum, even if *Moulton* contains an implicit "closely related" exception, it does not resolve whether the two charges were sufficiently related to require the conclusion that Cobb's lawyer for the burglary charge was necessarily his lawyer for the murder charge.

Cobb also errs in his reading of the state and federal courts' development of the "closely related" exception. Opp., at 11-13. A decade's worth of opinions has produced a bewildering kaleidoscope of factors that courts may apply to determine whether two offenses are "closely related," "very closely related," "extremely closely related," or "inextricably intertwined." *See Whittlesey*, 665 A.2d, at 234-35 (discussing cases). These are more than mere labels: application to this case shows that these shifting combinations of factors lead to diametrically opposed results depending on the circumstances of a given case.

For example, some courts have narrowly scrutinized the *conduct* underlying two separate charges to determine whether they are "closely related." *See, e.g., United States v. Williams*, 993 F.2d 451, 456 (CA5 1993); *United States v. Cooper*, 949 F.2d 737, 743-44 (CA5 1991); *Clankie*, 530 N.E.2d, at 452. Other courts have required that an allegedly improper interrogation have elicited

incriminating evidence as to the previously charged offense, or, relatedly, that the two offenses have *overlapping elements*. *See, e.g., Melgar*, 139 F.3d, at 1014-15; *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1224 (Mass. 1997); *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992).

In stark contrast to these cases, other courts have taken a broader view of the general factual situation giving rise to the two offenses. For example, in *United States v. Covarrubias*, the Ninth Circuit posited an extremely broad test, requiring "an examination and comparison of all of the facts and circumstances relating to the conduct involved." 179 F.3d 1219, 1225 (CA9 1999); *see also United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997) (looking to "similarities of time, place, person, and conduct" to determine "whether the same acts and factual predicates underlie both the pending and the new charges"). A leading case has posited that courts may take a more expansive view of the "closely related" exception where "there is evidence of deliberate police misconduct," *Whittlesey*, 665 A.2d, at 234-35, but the analytical relationship between these factors remains murky.[3]

This cornucopia of factors yields starkly different results when applied to the facts in *Cobb*. If "conduct" is the touchstone, then the burglary and murder charges at issue are clearly unrelated: the

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3. Cobb waxes on about the "law enforcement misconduct" issues in this case. Opp., at 15-18. His discussion, however, merely confirms *Whittlesey*'s observation that courts may consider evidence of deliberate police misconduct when assessing the "relatedness" of charged and uncharged offenses. Cobb does not bother to explain why the Court of Criminal Appeals's opinion does not contain a single word about police misconduct. That is so because there was not the slightest hint that the police deliberately attempted to circumvent Cobb's right to consult with counsel. Pet., at 29. Police misconduct is simply not an issue in this case.

burglary consisted of Cobb's entering the Owings' home with the intent to steal their property, while the murder involved his brutal killing of Maggie and Kori Rae. Pet., at 27-28. The charges are also unrelated if considered from an "evidence" standpoint: the evidence gathered from Cobb's confession to murder was not used, and indeed *could not be used*, to convict Cobb of a burglary he had already admitted to. Pet., at 28. By the same token, burglary was not the predicate felony for Cobb's capital murder conviction. Pet., at D-4, E-2. In a practical sense, then, Cobb's murder confession was never used to "prove" anything about the previously charged burglary.

Application of a broader, "fact-based" test could achieve the opposite result. A court might conclude that, because the burglary and the murder fortuitously occurred during similar times and places, both offenses shared the same "factual predicate" and were therefore "closely related." Indeed, the Court of Criminal Appeals's analysis in *Cobb* rests on the foundation that "the capital murder offense . . . was factually interwoven with the burglary." Pet., at A-7.

Cobb has thus failed to consider the complexity of the "closely related" exception that has propagated in the lower courts over the last fifteen years. Cobb's offenses might be considered "inextricably intertwined" or "separate," depending on jurisdiction and geography. In fact, had Cobb been prosecuted in a Texas *federal* court, the court would have applied the narrow conduct-based test in *Cooper* and concluded that the burglary and the murders were based on wholly separate conduct.

Neither federal constitutional law nor the state's ability to investigate crime can tolerate these fortuitous and irrational differences.

III. THE TEXAS COURT OF CRIMINAL APPEALS'S DECISION DOES NOT REST ON ANY STATE GROUNDS.

Finally, Cobb improperly argues that, because Texas procedural law would permit the offenses of burglary and murder to be joined for trial if part of the same criminal transaction, the Court of Criminal Appeals's decision therefore rests on "adequate state law grounds." Opp., at 18-22. The "independent and adequate state law" doctrine bars the Court's review only when a state court decides a question of federal law but its decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The adequacy and independence of state grounds, moreover, must be "clear from the face of the [state court] opinion." *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). In this case, the Court of Criminal Appeals's decision is grounded wholly on the Sixth Amendment and does not even mention state law. *See* Pet., at A-6, A-7. Cobb concedes this, Opp., at 20, and thus his argument must fail.

CONCLUSION

The Court of Criminal Appeals's decision in this case implicates two important and unsettled areas of Sixth Amendment law. This Court should grant the State's petition to resolve these critical aspects of federal constitutional jurisprudence.

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No. 99-1702

IN THE

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

vs.

RAYMOND LEVI COBB,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"In *Michigan* v. *Jackson*, 475 U. S. 625, the Court established a prophylatic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated interrogation." *Michigan* v. *Harvey*, 494 U. S. 344, 345 (1990). The questions presented in this case are:

1. Does the *Jackson* rule apply to questioning about a second offense, to which the Sixth Amendment right to counsel has not yet attached, if (1) that offense arises from the same criminal episode as an offense for which the right has attached, but (2) the two offenses have no elements in common, (3) the time, place, and conduct are merely related, not identical, and (4) the fruit of the questioning is not material to guilt of the first offense?

2. Does the *Jackson* presumption of invalidity of waiver apply when there has been both actual consultation with counsel and a lengthy break in custody since the original assertion of the right to counsel?

IN THE

Supreme Court of the United States

STATE OF TEXAS,

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Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case raises key issues concerning the police's ability to continue to investigate a suspect's additional criminal conduct after that person is charged with one crime. The Texas Court of Criminal Appeals has given a very expansive reading of the term "closely related," allowing the right to counsel to extend to uncharged crimes. It has made this decision without regard to the interrogation's minimal effect on the representation of counsel for the charged crime, with only some simple factual relation to the previously charged crime. This hostility to interrogations is part of a growing split of authority over when and how the right to counsel extends to uncharged crimes. Because police often do not know all of the crimes the suspect has committed at the time of charging, further interrogation is often necessary. The Texas court's needless limits on good police work is contrary to the rights of victims and society which CJLF was formed to serve.

June, 2000

Respectfully submitted,

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IN THE

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RAYMOND LEVI COBB,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Texas Court of Criminal Appeals and the trial judge's findings on the suppression motion. On December 27, 1993, defendant burglarized the residence of Lindsey and Margaret Owings in Walker County Texas. App. to Pet. for Cert A-3. He stole a stereo system, videocassette recorder, and other things. *Ibid.* During the burglary, defendant intentionally killed 22-year-old Margaret Owings and 16-month-old Kori Rae Owings. *Ibid.* Defendant had stabbed Margaret while burglarizing the home and buried her in the woods some two to three hundred yards from the home. *Id.*, at A-9 (McCormick, P. J., dissenting). He also took Kori and buried her alive with her mother. *Ibid.*

Cobb confessed to the burglary in July, 1994. *Id.*, at A-4. The validity of this confession is not challenged. He was indicted for burglary and was appointed counsel. *Ibid.*

"Appellant made bond in the burglary case and moved to another town [Odessa]." *Id.*, at A-10 (dissent).

Over a year later, while the burglary case was still pending, Cobb confessed this murder to his father, who told the police. The Odessa police administered the *Miranda* warnings, as did the magistrate. *Id.*, at D-3 and D-7 (trial court findings 8 and 24). Cobb understood and waived his rights "and voluntarily took officers to the area where the remains of Margaret Owings and the clothing of Kori Rae Owings were found." *Id.*, at D-3 (finding 8).

Defendant was convicted of intentionally killing two people in a single criminal transaction and was sentenced to death. *Id.*, at A-1. The burglary was originally included in the murder indictment, but that allegation was abandoned before trial. *Id.*, at D-4 (findings 10 and 13). The Texas Court of Criminal Appeals reversed the conviction, holding that the Odessa interrogation violated defendant's Sixth Amendment right to counsel, as the murders were "factually interwoven with the burglary" charge, to which his right to counsel had attached. See *id.*, at A-7-A-8.

SUMMARY OF ARGUMENT

The present state of the case law has left a confusing, undefined zone around the Sixth Amendment right to have counsel present during questioning and the circumstances in which that right can be waived. Specifically, when the right to counsel has attached and been invoked for one offense, for what other offenses may police question the defendant, with a valid *Miranda* advisement and waiver? The courts have issued conflicting, inconsistent decisions regarding the nature and degree of relationship between the two offenses which will permit or prohibit police-initiated questioning. In addition, the effects of a break in custody on the *Michigan* v. *Jackson* rule requires clarification.

These are important issues in which lower courts are in conflict, warranting this Court's attention. The Court created "bright-line" rules for the purpose of providing clear guidance to police. That guidance is not yet clear in this situation.

ARGUMENT

I. The scope of the "closely related" exception to the *McNeil* rule is unclear, has caused conflicting decisions, and is important.

The police must respect the rights of suspects, but in order to do that they must know the boundaries of those rights. "Forthright observance of rights presupposes their forthright definition." *Douglas* v. *Jeannette*, 319 U. S. 157, 182 (1943) (Jackson, J., concurring in the result). Clarity is particularly important for the prophylactic rules of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and its progeny, a category which includes *Michigan* v. *Jackson*, 475 U. S. 625 (1986). See *Michigan* v. *Harvey*, 494 U. S. 344, 345, 349-350 (1990). Clarity of direction to the police is the principal justification for these rules. *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993). If the rules are not clear, they fail to serve their function, and they ought to be discarded.

It will not do to lay down a vague rule and tell the police to err on the side of caution. The prophylactic rule itself exceeds the boundaries of the constitutional right. *Davis* v. *United States*, 512 U. S. 452, 458 (1994). If there is an additional gray zone around the rule, that zone creates in practice the additional layer of prophylaxis that this Court has refused to create in theory. Cf. *id.*, at 462.

When proceedings have commenced against a suspect on one charge, and he has requested and received counsel, for what other charges may the police question him if they comply with *Miranda*? We know from *McNeil* v. *Wisconsin*, 501 U. S. 171, 175-176 (1991) that a wholly unrelated offense is fair game, but

what about somewhat related offenses? The officers need to know, and at this point we can't tell them. *Maine* v. *Moulton*, 474 U. S. 159, 179-180 (1985) recognized the great importance of such investigations but failed to provide a clear answer. The Fourth Circuit made a game effort to infer a *sub silento* holding from *Moulton*, see *United States* v. *Melgar*, 139 F. 3d 1005, 1013 (1998), but rules of this nature and importance require greater clarity.

The Texas Court of Criminal Appeals in this case believed that a close factual relation alone was sufficient to invoke the exception. App. to Pet. for Cert. A-6. Its application of this rule to the facts, in its entirety, consists of the statement "his Sixth Amendment right to counsel attached to that offense [burglary], and to the capital murder offense, which was factually interwoven with the burglary." *Id.*, at A-7. Both this statement of the rule and its application are in conflict with federal court of appeals decisions.

A. Evidence Material to Prior Offense.

In *Melgar*, *supra*, the defendant urged the same rule that the Texas court adopted in the present case, *i.e.*, that factual relation was enough by itself. See 139 F. 3d, at 1014-1015. The Fourth Circuit declined to adopt this interpretation. *Id.*, at 1015. "A defendant must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses. [Citation.] Courts have not applied the closely related exception in favor of a defendant absent the production of such evidence. [Citations.]" *Ibid.*

This qualification on the "closely related" exception to *McNeil* is necessary to keep the exception within the bounds of its purpose, which is to prevent circumvention of the defendant's right to counsel on the *prior* offense. See *United States* v. *Martinez*, 972 F. 2d 1100, 1105 (CA9 1992) (quoting *Moulton*, *supra*, 474 U. S., at 171). If the interrogation produces nothing of value in prosecuting the prior offense, there has been no circumvention. Excluding otherwise admissible

evidence on this basis would be a pointless obstacle to the search for truth.

Massachusetts also considers the evidentiary effect of the statements when determining whether the Sixth Amendment has been violated. In *Commonwealth* v. *Rainwater*, 681 N. E. 2d 1218 (Mass. 1997), the fact that the interrogation produced inculpatory statements of both the charged and uncharged offenses was not alone a Sixth Amendment violation. In this case, "the statement was not admitted against Rainwater in a trial for the charged offense" because he pled guilty to that crime. *Id.*, at 1225. Since the statement about the charged crime "was brief and insignificant relative to Rainwater's admissions to the [uncharged crimes] for which he was subsequently tried," *id.*, at 1226, there was no reversible error.[1] Justice Fried's opinion distinguishes cases finding a derivative, "fruit of the poisonous tree" Sixth Amendment violation in similar situations, because those cases involved deliberate attempts by the police to circumvent the right to counsel through trickery. See *id.*, at 1225. Where there was no attempt to subvert the Sixth Amendment, the fact that the interrogation does not produce significant evidence of the charged crime is decisive. See *ibid.*; cf. *id.*, at 1224, n. 5 (discussing deliberate circumvention). However, if the elicited statements prove elements of the charged and uncharged crimes, then the exception should apply to prevent the government from circumventing the Sixth Amendment right to counsel. See *Melgar*, *supra*, 139 F. 3d, at 1015 (quoting *Moulton*, *supra*, 474 U. S., at 171). Such analysis is entirely absent from the opinion in the present case.

A related question concerns the quantum of evidence needed to trigger the exception. The District Court in *Melgar* thought that the evidence had to be necessary to the prosecution of the prior case. See *Melgar*, *supra*, 139 F. 3d, at 1015

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1. The opinion is uncertain whether this is a case of no error or harmless error. See *ibid.* *Amicus* believes it is the former.

(quoting *United States* v. *Melgar*, 927 F. Supp. 939, 952 (E.D. Va. 1996)). The Court of Appeals disagreed and apparently concluded that mere relevance was enough. *Ibid. Amicus* CJLF believes that a middle-ground standard, along the lines of materiality under *Brady* v. *Maryland*, 373 U. S. 83 (1963), strikes the appropriate balance, for reasons we will develop further if certiorari is granted.

Cobb's confession to the murder was relevant to his guilt of the burglary in the broadest sense of relevance, but it was not material. The burglary case was a "done deal" on guilt, Cobb having confessed. See App. to Pet. for Cert. D-5 (trial court finding 14). Cobb's lawyer consented to the police interviewing Cobb about other events of the day in question without counsel's presence, *ibid.* (finding 15), which no competent lawyer would do if there remained any chance of acquittal.

The present case therefore presents a clear factual record on which to decide if the "closely related" exception to *McNeil* will exclude evidence in the absence of any danger of the circumvention of the Sixth Amendment that is the basis of that exception. Certiorari should be granted to resolve that important question and to resolve the division of authority presently existing on it.

B. Degree of Relation Between Offenses.

Lacking guidance from this Court, the state and lower federal courts have also developed diverse and contradictory approaches as to what degree of connection between the offenses is required. The complexity surrounding the exceptions to the *McNeil* rule starts with the basic terminology describing the relationship between the charged and the uncharged crimes. General terms such as "closely related," "inextricably intertwined," and "inextricably enmeshed" have been used to describe the relationship between the charged and uncharged crimes that supports the exception to *McNeil*. See *Whittlesley* v. *State*, 665 A. 2d 223, 235 (Md. 1995) (collecting cases). The term "closely related" is further subdivided. Some

jurisdictions "have invoked Sixth Amendment carry-over for deterrent purposes where (1) the offenses are 'closely related,' construing that phrase relatively broadly, and (2) there is evidence of deliberate police misconduct." *Id.*, at 234-235. This differs from a second line of cases, which "focus entirely upon whether the facts underlying the charged and uncharged offenses are 'closely related' . . . ." *Id.*, at 235. At least one jurisdiction goes even further, requiring the offenses to be "extremely closely related" to each other. See *United States* v. *Cooper*, 949 F. 2d 737, 744 (CA5 1991).

The differences run deeper than mere labels. Although the analysis in these cases centers on the question of whether the new charge arises from the same acts as the pending charge, see *Whittlesley*, *supra*, 665 A. 2d, at 235, both the methodology and the answers differ considerably from court to court. A sharp contrast to the lenient factual analysis in the present case is found in *Cooper*, *supra*. Cooper had been arrested and charged with aggravated robbery in state court. 949 F. 2d, at 740. Six days after counsel had been appointed, a federal agent visited Cooper in jail and questioned him about a shotgun found in his car. Cooper admitted to receiving the shotgun from a friend, but denied participating in the convenience store robbery. *Ibid.* Cooper was convicted of aggravated robbery in Texas and subsequently convicted of unlawful possession of an unregistered firearm in federal court. *Id.*, at 740-741. Despite substantial overlap in the evidence, the federal and state charges still were not "*extremely* closely related" because the two crimes involved "different conduct . . . ." *Id.*, at 744 (emphasis in original). This contrasts sharply with the present case, which relies on no more than a factual nexus between disparate crimes. See *supra*, at 4.

The courts are split over how closely related factually the crimes must be for the Sixth Amendment protection to apply to the uncharged crimes. A few courts require only "similarities of time, place, person, and conduct." *United States* v. *Arnold*, 106 F. 3d 37, 41 (CA3 1997). Most courts, however, take a

narrower view of this exception to *McNeil*. *Commonwealth* v. *Rainwater*, *supra*, 681 N. E. 2d, at 1223-1224, requires identity, not similarity, criticizing *Arnold* and citing numerous cases. See *id.*, at 1224-1225, n. 7. The present case shows that very different crimes with entirely distinct elements and very different punishments can occur during a single episode of criminal conduct. Whether disparate crimes are "inextricably intertwined," or "closely related," or even "very closely related" depends upon how narrowly this exception is construed. Lacking guidance from this Court, the courts are split, while often providing the police and lower courts with little more guidance than abstract terms such as "logically distinct." See *United States* v. *Hines*, 963 F. 2d 255, 257 (CA9 1992) (*per curiam*); *People* v. *Wader*, 5 Cal. 4th 610, 654, n. 7, 854 P. 2d 80, 104, n. 7 (1993). The confusion is understandable since "the United States Supreme Court has not yet explained just how closely related the two offenses . . . must be for the rule to apply . . . ." *People* v. *Clankie*, 530 N. E. 2d 448, 452 (Ill. 1988).

Courts, police, and prosecutors need more than general terms to guide them. It is important for them to know whether time, place, and conduct are the only relevant factors, or whether other considerations, such as the relative "seriousness of the offenses," see *In re Michael B.*, 125 Cal. App. 3d 790, 795, 178 Cal. Rptr. 291, 294 (1981), also matter. They need to know whether identity is required, as *Rainwater* says, or similarity is enough, as *Arnold* says. At least one court even doubts whether there is an exception to *McNeil*. See *Whittlesley*, *supra*, 665 A. 2d, at 233-234, n. 8.

The present case involves two very different crimes that were committed during a criminal transaction. The burglary and the murders in this case have entirely different elements and very different levels of seriousness. Since the burglary was completed when Cobb entered the house, the charged crime was committed before the uncharged murders. The murders were

different acts, and one of them occurred at a different place. Thus the time, place, and conduct are not identical.

The present case thus presents an ideal case for determining when, if ever, the charged and uncharged crimes are sufficiently closely related to suspend the *McNeil* rule. This Court can clarify the standard and specify what factors are relevant for courts to analyze and police and prosecutors to apply. Setting the standards will provide much-needed guidance and resolve important conflicts between the courts on this question.

II. Whether the *Jackson* presumption of invalidity of waiver extends past release from custody, actual consultation with counsel, or both, is an important question which should be decided by this Court.

The general rule is that rights can be waived if the waiver is voluntary, knowing, and intelligent, and the Sixth Amendment right to have counsel present during questioning is no exception. *Patterson* v. *Illinois*, 487 U. S. 285, 291 (1988). The *Miranda* procedures are generally sufficient to establish validity of the waiver. *Id.*, at 293.

Edwards v. *Arizona*, 451 U. S. 477, 484-485 (1981) established a rule that a waiver of previously invoked *Miranda* rights would not be deemed valid if it was made in response to police-initiated custodial interrogation. The purpose of the rule is to protect in-custody suspects from being badgered into waiver. *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990); *Minnick* v. *Mississippi*, 498 U. S. 146, 150 (1990). *Michigan* v. *Jackson*, 475 U. S. 625 (1986) simply imported this reasoning to the Sixth Amendment context. *Harvey*, 494 U. S., at 349.

In effect, *Edwards* creates a mandatory, conclusive presumption of coercion of the waiver, just as *Miranda* itself creates such a presumption of coercion of an unwarned custodial confession. Cf. *Oregon* v. *Elstad*, 470 U. S. 298, 307, n. 1

(1985). Mandatory conclusive presumptions are so inherently unfair that their use by the state against a defendant violates the Constitution. See *Carella* v. *California*, 491 U. S. 263, 265 (1989) (*per curiam*). It almost goes without saying that courts should be circumspect in imposing on the people the same kind of inherently unfair rule the Constitution forbids placing on the defendant. When such a presumption is created, its boundaries should be tailored to the situations where the presumed fact is highly likely to match reality. Cf. *Stanley* v. *Illinois*, 405 U. S. 645, 653-655 (1972) (presumption that unmarried fathers are unfit parents is invalid); *McNeil* v. *Wisconsin*, 501 U. S. 171, 177 (1991) (declining to adopt "contrary-to-fact presumption").

While the Fifth and Sixth Amendments rights differ in their purpose and scope, see *McNeil* at 177-178, the circumstances of coerced waiver do not. The likelihood that a particular circumstance will or will not produce a coerced waiver of the right to have counsel present during interrogation does not depend on whether the right springs from the Fifth versus the Sixth Amendment.

A number of cases have held that the *Edwards* presumption terminates upon release from custody. *United States* v. *Skinner*, 667 F. 2d 1306, 1309 (CA9 1982) (*per curiam*) is often cited for this rule, and the break in custody is sometimes called a "*Skinner* break." See *United States* v. *Hines*, 963 F. 2d 255, 257 (CA9 1992). The consensus of the circuits is "that if, after invoking her Fifth Amendment right to counsel, a suspect is released from custody, then the concerns that prompted *Edwards*' prophylactic rule are sufficiently minimized that any *Edwards* violation allegedly founded on those prior requests simply 'dissolves.' " *United States* v. *Barlow*, 41 F. 3d 935, 945, and n. 35 (CA5 1994) (*per curium*) (citing *Skinner*, *supra*; *Hines*, *supra*; *Dinkins* v. *Thigpen*, 854 F. 2d 394, 397 (CA11 1988); *United States* v. *Fairman*, 813 F. 2d 117, 125 (CA7 1987); *McFadden* v. *Garraghty*, 820 F. 2d 654, 661 (CA4 1987)); see also *People* v. *Storm*, 2000 L. A. Daily Journal D.A.R. 4059, 4061, and n. 3, No. D030950 (Cal. App. Apr. 19,

2000) (collecting cases and noting uniformity of holding). *McNeil*, *supra*, 501 U. S., at 177, recognized the break-in-custody exception to *Edwards*, albeit in dictum.

The present case is appropriate to confirm the break-in-custody rule at the Supreme Court level in holding rather than dictum, and, more importantly, to decide whether it applies to *Jackson* as well as *Edwards*, *i.e.*, to the Sixth Amendment as well as the Fifth.

If, for some reason, the Court concludes that *Jackson* differs from *Edwards* in this regard, it would be necessary to ask whether *Minnick* applies. *Minnick* held that consultation with counsel alone is not enough to terminate the protection of the *Edwards* rule. *Minnick*, *supra*, 498 U. S., at 153. If the Fifth and Sixth Amendments differ in this area, because the Fifth is about compulsion and the Sixth is about assistance of counsel, then actual consultation with counsel is more directly responsive to the Sixth and deserves greater weight in the calculus. The state's provision of counsel and defendant's actual consultation with counsel are surely relevant, and the effect on the Sixth Amendment analysis requires clarification.

"The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Id.*, at 151. That is equally true of *Jackson*. Yet that clarity and certainty are presently lacking in the frequently recurring situation presented by this case.

CONCLUSION

The petition for writ of certiorari should be granted.

June, 2000

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(3)

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OCTOBER TERM, 1999

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RAYMOND LEVI COBB,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND THE COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS IN SUPPORT OF PETITIONER

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June 21, 2000

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QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but factually related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

III.

If the Court decides in *Dickerson v. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson* – which grafted *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), into the Sixth Amendment context – constitutionally require the result in this case?

No. 99-1702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Petitioner has consented to the filing of this brief, by letter dated June 20, 2000. Respondent, however, has refused to grant consent. Pursuant to Supreme Court Rule 37.2(b), therefore, *amici curiae* the National Association of Police Organizations (NAPO) and the Combined Law Enforcement Associations of Texas (CLEAT) respectfully move for leave to file this brief in support of Petitioner in the above-captioned case.

NAPO is a non-profit organization that represents state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that advances the interests of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations with more than 220,000 sworn law enforcement officers and 11,000 retired officers.

CLEAT is the largest and one of the oldest state law enforcement labor organizations in the State of Texas. CLEAT is a non-profit organization that represents state and local law enforcement officers in Texas and advances the interests and legal rights of law enforcement officers. CLEAT represents over 12,000 peace officers, correctional officers, public safety employees and other board-approved classes of members.

NAPO, CLEAT and the officers they represent have a direct and immediate interest in any case that affects the ability of law enforcement officers to investigate crimes – especially where, as here, the decision below hinders investigative practices and frustrates good-faith, by-the-book police work. *Amici* submit that the perspective of front-line law enforcement officers, as set forth in this brief, is distinct from that of the State of Texas, and will be of substantial assistance to the Court as it considers whether this case is of sufficient importance to the criminal justice system to warrant the Court's attention.

Accordingly, *amici* request leave to file the attached brief in support of Petitioner.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Association of Police Organizations (NAPO) is a non-profit organization that represents state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that advances the interests of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations with more than 220,000 sworn law enforcement officers and 11,000 retired officers.

The Combined Law Enforcement Associations of Texas (CLEAT) is the largest and one of the oldest state law enforcement labor organizations in the State of Texas. CLEAT is a non-profit organization that represents state and local law enforcement officers in Texas and advances the interests and legal rights of law enforcement officers. CLEAT represents over 12,000 peace officers, correctional officers, public safety employees and other board-approved classes of members.[1]

Both NAPO and CLEAT and the officers they represent have a direct and immediate interest in any issue that affects the ability of law enforcement officers to investigate crimes.

STATEMENT OF THE CASE

On December 27, 1993, Raymond Levi Cobb brutally murdered and secretly buried Margaret Owings and her sixteen-month-old daughter Kori Rae in the course of burglarizing the Owings' home. Cobb was soon questioned by Walker County police and confessed to the burglary, although he denied any involvement in the disappearance of Margaret and Kori Rae.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Although petitioner has consented to the filing of this brief, respondent has not, and the *amici* have therefore included a motion for leave to file pursuant to Supreme Court Rule 37.2(b).

Cobb was then indicted for burglary and counsel was appointed for him on that charge. *See* Pet. App. A-4.

After being released on bail on the burglary charge, Cobb moved to Odessa, Texas, over 500 miles away from Walker County. While there, on November 11, 1995, Cobb confessed to his father that he had murdered Margaret and Kori Rae Owings. Cobb's father reported the confession to the Odessa police, who contacted the Walker County Sheriff's office and obtained a warrant for Cobb's arrest on the charge of murder. Unaware that Cobb had been indicted and had counsel in the burglary case, the Odessa police located Cobb and arrested him. The Odessa police fully informed Cobb of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Indeed, they followed a procedure that is *more* protective of a suspect's rights than the guidelines established in *Miranda* and under which they advised Cobb of his rights in writing and received a written waiver signed before a witness. *See* Tex. Code Crim. P. Ann. art. 38.22, § 2. Cobb then signed a written statement confessing to the murders. Pet. App. A-5. Cobb was convicted of the double murder and sentenced to death.

The Texas Court of Criminal Appeals overturned Cobb's conviction on the ground that his confession should have been suppressed because it was taken in violation of Cobb's Sixth Amendment right to counsel. According to the court below, "once the right to counsel attaches to [an] offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." Pet. App. A-6. The court concluded that the double murder was "factually interwoven" with the burglary, and thus that Cobb's Sixth Amendment right to counsel with respect to the murders had attached upon the indictment for the burglary. *See id.* A-7. The court further concluded that under *Michigan v. Jackson*, 475 U.S. 625 (1986), Cobb's waiver of his right to counsel before his interview with the Odessa police was invalid because

Cobb had "asserted" his right to counsel by "accepting [the] appointment [of] counsel" on the burglary charge. Pet. App. A-7. Thus, under its interpretation of *Jackson*, the court applied the rule that "once the right to counsel has attached and has been invoked, any subsequent waiver during police-initiated interrogation is ineffective unless counsel has first given permission for the interrogation." *Id.* at A-6. Finally, the court concluded that it made no difference that the police in Odessa had no knowledge of the burglary indictment in Walker County and that they had acted in good faith by fully *Mirandizing* Cobb before questioning him, because the court should "'impute the State's knowledge from one state actor to another.'" *Id.* at A-7 (quoting *Jackson*, 475 U.S. at 634).

REASONS FOR GRANTING THE WRIT

The decision below implicates two distinct conflicts of authority in the lower courts. First, by holding that the rule of *Michigan v. Jackson* applies even where a defendant has made no affirmative assertion of his right to counsel, the court below improperly expanded the application of *Jackson* and placed itself on one side of a square conflict over the proper scope of that decision. Second, by holding that Cobb's Sixth Amendment right to counsel attached with respect to the murders upon his indictment for the burglary because the crimes were "closely related," the court below again placed itself on one side of an increasingly complex clash between lower court rulings.

The result of the lower court's expansive interpretation of Sixth Amendment protections is a wholly unworkable rule for the law enforcement profession. Here, even though officers in Odessa had no knowledge of Cobb's indictment or retention of counsel on the burglary charge, and even though they scrupulously adhered to all requirements to warn Cobb fully of his rights and to secure a valid waiver before questioning him on the distinct charge of murder, Cobb's confession to a double

murder was suppressed. A rule that requires suppression of a voluntary statement of a confessed murderer obtained through entirely good-faith and proper police work will do nothing but hamstring legitimate police efforts to solve crimes and take offenders off the streets.

I. THE DECISION BELOW AGGRAVATES A PLAIN CONFLICT BETWEEN COURTS OF APPEALS AND STATE COURTS OF LAST RESORT CONCERNING THE SCOPE OF A CRIMINAL DEFENDANT'S ABILITY TO WAIVE HIS SIXTH AMENDMENT RIGHT TO COUNSEL UNDER *MICHIGAN v. JACKSON*.

The court below further aggravated a clear conflict of authority in the lower courts by holding that the rule from *Michigan v. Jackson*, *supra*, should apply in this case to invalidate Cobb's waiver of his right to counsel even though Cobb never made any affirmative assertion of the right. As explained below, the rule applied in this case flatly contradicts the interpretation of *Jackson* applied by the Fifth Circuit and the Supreme Court of Louisiana, under which *Jackson* can be invoked *only* where the defendant has made some positive effort to invoke his right to counsel.

In *Michigan v. Jackson*, this Court determined that once formal criminal proceedings have been initiated against a suspect on a particular charge, thereby triggering attachment of the Sixth Amendment right to counsel, and the suspect has asserted his right to counsel, the suspect cannot subsequently make a valid waiver of the right in a police-initiated interrogation unless counsel is present. In essence, the Court extended to the Sixth Amendment context the rule developed in the context of the Fifth Amendment right to counsel in *Edwards v. Arizona*, 451 U.S. 477 (1981), under which it is conclusively presumed that once a suspect has invoked his right to counsel, any subsequent waiver of the right to counsel in a

police-initiated interrogation will be invalid, unless made in the presence of counsel. The logic of the rule announced in *Jackson* necessarily hinged on the accused's affirmative *assertion* of his right to counsel. The Court, indeed, explained its ruling in precisely those terms. It noted that *Edwards*, on which it relied, "is grounded in the understanding that the *assertion* of the right to counsel is a significant event, and that additional safeguards are necessary when the accused *asks for* counsel." *Jackson*, 475 U.S. at 635 (emphases added; internal citations and quotations omitted).[2]

The Court subsequently explained this logic further in *Patterson v. Illinois*, 487 U.S. 285 (1988). That case involved a defendant who made incriminating statements in a post-indictment interview after being advised of his rights and waiving them. In rejecting the defendant's attempt to suppress his statement under *Jackson*, the Court explained that *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police." *Id.* at 291 (citation omitted). The Court went on to explain that the "essence of *Edwards* and its progeny" is "[p]reserving the integrity of an accused's choice to communicate with the police only through counsel" – "not barring an accused from making an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291. As a result, the key for securing the benefit of *Jackson*'s limitation on waivers of the Sixth Amendment right to counsel is that the accused must make an affirmative *assertion* of the

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[2] Writing in dissent, then-Justice Rehnquist emphasized that the Court had *not* held that the mere attachment of the right to counsel would suffice to bar subsequent uncounseled waivers in police-initiated interviews. *See id.* at 640 (Rehnquist, J., dissenting joined by Powell & O'Connor JJ.). Nor could the Court have taken that approach without rendering "nugatory the extensive discussion of 'waiver' in such prior Sixth Amendment cases as *Brewer v. Williams*." *Id.*

right to counsel that is sufficient to indicate to reasonable minds that the accused has decided to deal with the government only through the medium of counsel.

At the same time, however, *Patterson* also contains some ambiguous statements in a footnote that have since spawned confusion in the lower courts. The Court noted that it was a "matter of some significance" that the defendant "had not retained, or accepted by appointment, a lawyer to represent him," and stated that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id.* at 290 n.3. Some courts – including the court below – have relied on this language to expand *Jackson* beyond its logical limits to situations where a defendant has made no affirmative assertion of his right to counsel. In so doing, they not only have departed from this Court's precedents, but they have also created an irreconcilable conflict in authority.

On one side of the conflict, the leading decisions expanding the application of *Jackson* to situations where a defendant has not made any effort to invoke his right to counsel are *Dew v. United States*, 558 A.2d 1112 (D.C. 1989), and *Holloway v. State*, 780 S.W.2d 787 (Tex. Crim. App. 1989) (*en banc*). In *Dew*, after the defendant had been indicted and counsel had been appointed for him he was *Mirandized* for a police interview and gave an incriminating statement. The court acknowledged that the defendant "did not affirmatively request counsel within the meaning of *Michigan v. Jackson*," 558 A.2d at 1116 n.4, but nevertheless held that "appointment of counsel as such" is equivalent to the "request for counsel" required by *Jackson*, *id.* at 1116. The court thus suppressed the defendant's statement simply because counsel had been appointed for him. Similarly, in *Holloway*, the court framed the issue before it as being whether an indicted defendant "who had been appointed counsel" could be "capable of waiving his Sixth Amendment

right to counsel." 780 S.W.2d at 791. The court concluded that – even where the defendant never affirmatively asserted his desire to exercise his right to counsel – any waiver made by an indicted defendant who "has been appointed defense counsel," 780 S.W.2d at 795, would be invalid.[3]

In irreconcilable conflict with *Dew* and *Holloway* are *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), and *State v. Carter*, 664 So. 2d 367 (La. 1995). In *Montoya*, after the defendant was arraigned and appointed counsel he was again *Mirandized* and waived his rights in a police interview. The Fifth Circuit held the waiver valid under *Jackson* because, even though counsel had been appointed, the defendant never made any affirmative effort to invoke his right to counsel; rather, he had remained entirely silent when counsel was appointed for him. The court explained that the critical factor in determining when to apply *Jackson* was just such an affirmative assertion of the right and that, "[f]or purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's desire to deal with police only through counsel." *Montoya*, 955 F.2d at 283 (citation omitted).

In *Carter*, the Supreme Court of Louisiana followed *Montoya*. The case involved a post-arraignment interview of a defendant who had been appointed counsel and who waived his right to counsel at the beginning of the interview. The court

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[3] The *Holloway* court did initially conclude that *Jackson* required an affirmative assertion of the right to counsel and that, because the defendant had not made such an assertion, *Jackson* did not apply. *See* 780 S.W.2d at 790. The court immediately proceeded, however, to hold that under *Patterson*, because the defendant was represented by counsel, he could not waive his right to counsel without counsel present. The end result was thus effectively to apply the rule from *Jackson* whenever the defendant is represented by appointed counsel, even if the defendant has never affirmatively asserted his desire to exercise his right to counsel.

rejected the view that the appointment of counsel in itself could trigger application of *Jackson* and concluded that the defendant's waiver was valid. *See Carter*, 664 So. 2d at 376-80. Indeed, the court explained that "the Supreme Court has not erected a per se barrier against the validity of waivers made in response to interrogation, *even where defendant is represented by counsel*." *Id.* at 377 (emphasis added). The critical factor for invoking *Jackson* was not the "appointment of counsel itself," but rather the defendant's "'request for counsel'" or "'assertion . . . of his right to counsel.'" *Id.* at 380 (quoting *Jackson*, 475 U.S. at 635). The court, moreover, explicitly acknowledged the conflict between its decision and the holdings in *Dew* and *Holloway*. After describing the holdings in those cases, the court stated in no uncertain terms that it had to "disagree with this approach." *Id.* at 380 n.12.[4]

The decision below further solidifies the conflict outlined above. Assuming that Cobb's Sixth Amendment right to counsel had even attached with respect to the murders on which he had not yet been indicted, *but see infra* pp. 10-17, the lower court's decision to apply the *Jackson* rule and to suppress Cobb's confession, even though Cobb never made any affirmative assertion of his right to counsel, flatly contradicts the rule applied in *Montoya* and *Carter*. Indeed, the court below made the conflict particularly clear by holding that "once [Cobb's] right to counsel attached, he asserted it by accepting [the] appointment [of] counsel." Pet. App. A-7. But *Montoya* explicitly rejected the theory that silently acquiescing in the appointment of counsel could be considered an "assertion" of

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[4] Other state supreme courts have also followed the approach taken in *Montoya* and *Carter*. *See Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999); *Smith v. State*, 699 So. 2d 629, 638-39 (Fla. 1997), *cert. denied* 523 U.S. 1008 (1998), and *cert. denied*, 523 U.S. 1020; *People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994).

the right for purposes of invoking the protections of *Jackson*. *See Montoya*, 955 F.2d at 283. Had the court below applied the rule from *Montoya* or *Carter*, Cobb's confession would not have been suppressed, because there is no suggestion anywhere in the record that Cobb asserted his right to counsel or in any way indicated that he wished to deal with police only through counsel. To the contrary, as Petitioner the State of Texas has explained, on several occasions when police sought to interview Cobb concerning the disappearance of Margaret and Kori Rae Owings, Cobb's counsel on the burglary charge indicated that the police could speak with Cobb without counsel present as long as Cobb agreed, Pet. App. A-4, and there is no suggestion that Cobb himself ever raised an objection to these interviews.

The conflict between the rule applied below and the rule applied by the Fifth Circuit is made even more stark because this case arose in Texas. Under current law in the State of Texas, the scope of a criminal defendant's ability to waive his Sixth Amendment right to counsel in a post-indictment interrogation as a matter of federal constitutional law depends upon the fortuity of whether the prosecution is proceeding in federal or state court.

The split in the lower courts has clearly crystallized over the past decade into a well-defined disagreement over the scope of *Jackson*. The conflict in authority, moreover, has already become sufficiently refined to generate scholarly commentary. *See, e.g.*, Meredith B. Halama, Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule," 1998 U. Ill. L. Rev. 1207. As one author has pointed out, the "ambiguous language" in *Patterson* and *Jackson*, "left open many questions of how different factors might change Sixth Amendment waiver analysis," including whether the outcome would change if there were a "present attorney-client relationship" or "[i]f counsel had been

appointed, but not specifically requested." *Id.* at 1230-31. And as explained above, different courts have reached starkly different conclusions in those situations. This case presents an appropriate vehicle for resolving the conflict in the lower courts, and this Court should grant the petition for certiorari to eliminate the confusion surrounding application of *Jackson*.

II. THE DECISION BELOW INTENSIFIES A CONFLICT IN THE LOWER COURTS CONCERNING THE APPLICATION OF THE OFFENSE-SPECIFIC SIXTH AMENDMENT RIGHT TO COUNSEL TO DISTINCT BUT FACTUALLY RELATED CRIMES.

The Texas Court of Criminal Appeals' decision also deepens another conflict among the lower courts. This Court has long held that the Sixth Amendment right to counsel is offense specific – in other words, that it attaches only to the particular offense charged when formal criminal proceedings are initiated and not to other, uncharged offenses. *See, e.g.*, *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Nevertheless, many lower courts have adopted an exception to the offense-specific character of the Sixth Amendment right when a defendant is involved in multiple crimes that are "closely related." Under this exception, once the Sixth Amendment right attaches to an offense, it attaches to all "closely related" offenses and, similarly, when the right to counsel is asserted for *Michigan v. Jackson* purposes, the assertion applies to all closely related offenses, thus barring police-initiated questioning concerning those offenses unless counsel is present. This exception, however, has never been mandated by a decision of this Court. Moreover, in constructing the "closely related" exception the lower courts have developed different and conflicting tests. This Court should grant certiorari to provide clear guidance concerning whether and when the Sixth Amendment right to counsel requires extending the right from

a particular offense to which it has attached to other "closely related" offenses on which formal criminal proceedings have not yet been initiated.

A. The "Closely Related" Exception to the Offense-Specific Character of the Right to Counsel Is Not Clearly Established in This Court's Precedents.

This Court has often stated the established principle that the Sixth Amendment right to counsel is offense specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *see also Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985); *United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). Moreover, the Court has also made clear that, just as the Sixth Amendment right is offense specific, "so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *McNeil*, 501 U.S. at 175.

Despite the Court's clear statements that the right to counsel is offense specific, many lower courts have created an exception to that rule. The lower courts derive this exception from two cases, *Brewer v. Williams*, 430 U.S. 387 (1977), and *Maine v. Moulton*, 474 U.S. 159 (1985).

In *Brewer*, the Court considered the admissibility of statements made by an accused after he had been indicted for kidnapping a ten year old girl. These statements implicated him in the murder of the girl. Because the police obtained these statements after the accused had obtained a lawyer in the kidnapping proceedings, and after the police agreed with the lawyer not to question the accused, the Court excluded the inculpatory statements. *See Brewer*, 430 U.S. at 400.

In *Moulton*, the Court considered the admissibility of statements obtained by a police informant. Both Moulton and an accomplice were indicted for the theft of several vehicles

and assorted auto parts. They each retained counsel. The accomplice then agreed to aid the police in obtaining incriminating statements from Moulton using wire transmitters and telephone recordings. These recordings were used to obtain seven additional indictments against Moulton, including an indictment for burglary for breaking into a car dealership to steal the auto parts. At trial, Moulton was convicted of burglary and theft in connection with two vehicles and the auto parts. *See Moulton*, 474 U.S. at 167. In a 5-4 decision, the Court held the recordings inadmissible because they were obtained in violation of the Sixth Amendment. *See id.* 474 U.S. at 180.

In both *Brewer* and *Moulton*, the Court excluded evidence obtained after the defendant had been indicted and after he was represented by counsel. Since this excluded evidence related to offenses that were not yet charged, the lower courts have read these cases as presenting an exception to the usual rule that the Sixth Amendment right to counsel is offense specific.

A few courts, however, have questioned whether this exception exists. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 233-34 (Md. 1995) (questioning whether the exception is "compelled by Supreme Court precedent"); *People v. Clair*, 828 P.2d 705, 722 (Cal. 1992) (declaring *Brewer* "no longer vital" in the wake of *McNeil*). Indeed, *Brewer* and *Moulton* provide only tenuous support for an exception to the ordinary rule that the Sixth Amendment right to counsel is offense specific. The incriminating statements in *Brewer* were obtained in violation of an agreement between the police and the defendant's lawyer. The lawyer obtained this agreement before consenting to the unaccompanied transportation of the accused from Davenport, Iowa, to Des Moines. *See Brewer*, 430 U.S. at 390-91. The Court relied on this agreement in explaining its decision, *see id.*, 430 U.S. at 401 n.8, and Justice

Stevens, whose vote was essential to the 5-4 decision, relied heavily on the agreement in his concurring opinion. *See id.*, 430 U.S. at 415 (Stevens, J., concurring).

The incriminating statements in *Moulton* were used to expand the charges against the defendant from theft to burglary. Moulton was then convicted of both burglary and theft. *See State v. Moulton*, 481 A.2d 155, 157 (Me. 1984). Under Maine law, burglary is defined as "enter[ing] or surreptitiously remain[ing] in a structure . . . with the intent to commit a crime therein." Me. Rev. Stat. Ann. tit. 17, § 401 (1983). The elements of the burglary charge in *Moulton* were met with the underlying theft charge combined with breaking into a car dealership. The only exception for closely related offenses suggested by *Moulton*, therefore, applies where the offense for which the accused has been indicted constitutes an element of the offense for which incriminating statements were elicited. This exception is far narrower than the one adopted by many lower courts.

B. Lacking Any Guidance from This Court, Lower Courts Have Developed Conflicting and Inconsistent Approaches in Applying the "Closely Related" Exception.

Because there is no clear precedential support for this exception, the lower courts that have applied it have produced a number of conflicting and contradictory tests. These tests all purport to determine whether offenses are "closely related" or "inextricably intertwined," terms that are used relatively interchangeably. *See, e.g., Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223 n.5 (Mass. 1997) ("[W]e adopt the 'inextricably intertwined' language, although we, like other courts, recognize that this same test is denoted by various other labels."), *cert. denied*, 522 U.S. 1095 (1998). But while different courts use the same terms, the actual standards they apply to determine whether the Sixth Amendment right to

counsel has attached are varied and, as explained below, can yield starkly different outcomes even on the same fact pattern.

The Ninth Circuit has developed the broadest test for determining whether offenses are "closely related." Under the Ninth Circuit test, offenses that arise out of the same facts are considered closely related for Sixth Amendment purposes. *See United States v. Covarrubias*, 179 F.3d 1219, 1225 (9th Cir. 1999) ("Deciding whether the exception is applicable requires an examination and comparison of all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes."); *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992) (rejecting a claim to the exception when the same offenses were charged, but "the place, time, and persons involved were all different"). Furthermore, statements obtained during police interrogation are inadmissible when there is evidence of deliberate disregard of the Sixth Amendment. *See United States v. Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992) ("[C]ollusion by the prosecutorial authorities to circumvent the right to counsel may cause Sixth Amendment protection to bridge the gap between separate and non-intertwined offenses.").

Some courts have found an exception when the underlying facts are the same, regardless of the lack of evidence of bad faith. In *United States v. Arnold*, 106 F.3d 37 (3d Cir. 1997), the Third Circuit adopted the closely related exception. *See id.* at 42. The court then found that the offenses of witness intimidation and attempted murder were closely related, since "both charges: (1) involve the same witness; (2) arise from the same facts and circumstances; (3) are closely related in time; and, (4) involve conduct related to [the defendant's] attempt to prevent [the same witness] from cooperating . . . ." *Id.* This fact-based approach has been adopted by a number of state courts. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 236 (Md.

1995); *In re Pack*, 616 A.2d 1006 (Pa. Super. Ct. 1992); *People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988).

The Fourth Circuit uses a narrower test. Initially, the Fourth Circuit adopted the closely related exception when two offenses had "the same factual predicate." *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993). In *United States v. Melgar*, 139 F.3d 1005 (4th Cir. 1998), the court modified the test, stating that "[a] defendant must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses." *Melgar*, 139 F.3d at 1015.

The Fifth Circuit applies an even narrower test. *See United States v. Cooper*, 949 F.2d 737, 744 (5th Cir. 1991). Cooper robbed a convenience store using a sawed-off shotgun. *See id.* at 745. When the police located Cooper's car, they impounded it and, during the inventory search, found the sawed-off shotgun in the trunk. Cooper was later apprehended and charged with aggravated robbery. Counsel was appointed to represent him. Six days later a federal agent interviewed Cooper about the shotgun and Cooper admitted possessing it. Cooper was later charged in federal court with possession of an unregistered firearm. *See Cooper*, 949 F.2d at 740-41.

The Fifth Circuit refused to suppress Cooper's statements about the gun on Sixth Amendment grounds. The court noted that other courts had suppressed such statements upon a finding that charged and uncharged crimes were closely related. Nevertheless, the court refused to exclude the statements in *Cooper* because "the federal and state crimes concern different conduct, although, efficiently for the governments, both prosecutions could use much of the same evidence." *Cooper*, 949 F.2d at 744. In subsequent cases, the Fifth Circuit has continued to interpret the conduct-based exception very narrowly. *See, e.g., United States v. Williams*, 993 F.2d 451, 456 (5th Cir. 1993) ("Only under extremely

narrow circumstances will the Sixth Amendment right to counsel also attach to other offenses.")

C. This Case Would Be Resolved Differently Under the Conduct-Based and Fact-Based Tests.

The multiplicity of tests used by various courts to determine whether offenses are closely related allows the admissibility of incriminating statements to depend upon the fortuity of geography. Furthermore, the multiple tests create confusion for law enforcement officers, who have no bright lines to guide their conduct. In fact, in Texas the "closely related" exception is governed by two different tests applied by the state and federal courts, respectively. The two tests, moreover, would produce different results in this case.

In state court, a fact-based approach governs, and crimes are considered "closely related" if they involve the same or a closely intertwined set of facts. Under that approach, albeit stretched to its limits, the decision below is arguably correct, because the murders arose from loosely the same set of interwoven facts as the burglary.

In contrast, under the conduct-based test adopted by the Fifth Circuit the crimes at issue here would not be considered closely related. As outlined above, in *Cooper*, the Fifth Circuit held that a firearm charge was not closely related to an armed robbery charge, *even when the firearm was used in the robbery* and the evidence demonstrating possession of the firearm was uncovered solely as part of the investigation of the robbery. To the Fifth Circuit, the critical factor was that the two offenses required proof of different conduct. *See Cooper*, 949 F.2d at 744. It did not matter if the two offenses had been committed essentially together so that much of the same evidence arising from the same set of facts could be used to establish the two

crimes. *Id.* As long as the conduct that defined the crimes was different, the crimes would not be considered closely related.

Under that test, Cobb's two crimes in this case would not be considered closely related, because under Texas law burglary and murder are clearly defined by entirely different conduct. *See Fearance v. State*, 771 S.W.2d 486, 493 (Tex. Crim. App. 1988) (en banc) ("[T]he indictment alleged and the proof showed that appellant was engaged in felonious criminal conduct, specifically, burglary at the time [the victim] was murdered. This conduct was a property offense. Therefore, there was a showing of felonious criminal conduct other than the assault which caused the death of [the victim]."). As in *Cooper*, much of the same evidence might be used in the prosecution of both crimes. But, also as in *Cooper*, the specific conduct that constitutes each offense is entirely distinct. The offense of burglary was complete when Cobb entered the Owings' house with the intent to commit theft. *See* Tex. Penal Code Ann. § 30.02(a)(1). The offense of capital murder with which Cobb was charged involved the entirely separate conduct of killing Margaret and Kori Rae, and specifically it was Cobb's conduct in killing two persons that made the crime capital murder. *See* Tex. Penal Code Ann. § 19.03(a)(7). The conduct that constituted the offense of burglary was never used as any element of the crime of murder with which Cobb was charged. Thus, under the Fifth Circuit test, Cobb's indictment for the burglary would *not* have triggered his Sixth Amendment right to counsel with respect to the murder charge.

Once again, this case presents a sharp conflict between the standards of federal constitutional law applied under the Sixth Amendment in the state and federal courts within the state of Texas. This Court should grant certiorari to eliminate the conflicts arising from the application of different versions of the "closely related" test.

III. THE DECISION BELOW CREATES AN UNWORKABLE RULE THAT WILL HOBBLE GOOD-FAITH POLICE EFFORTS TO QUESTION SUSPECTS ABOUT UNSOLVED CRIMES AS TO WHICH NO CHARGES HAVE YET BEEN BROUGHT.

By expansively applying the rule from *Michigan v. Jackson* even to cases where a suspect has not made any affirmative assertion of his right to counsel, and by broadly interpreting the standard for determining whether two offenses are "closely related," the Texas Court of Criminal Appeals created a wholly unworkable rule that will unduly hinder legitimate police efforts to solve crimes. This case thus presents a particularly important opportunity for addressing the plain conflicts among the lower courts outlined above.

Under the decision below, even where police have insufficient evidence to charge a suspect with a crime, and even where that suspect has never made any affirmative assertion of his right to counsel, questioning of the suspect will be barred (absent the presence of counsel) if the unsolved crime is, under some vague standard, factually related to another crime on which charges have been brought. The rule is especially unworkable when combined – as it was here – with an unwarranted and unrealistically broad application of the presumption that knowledge concerning appointment of counsel for a suspect must be imputed to *all* state actors. The facts in this case aptly illustrate the impossible situation in which the decision places police. The court below presumed that officers in Odessa had the same knowledge about counsel being appointed for Cobb as did the sheriff's office in Walker, Texas – over 500 miles away.

That is simply unrealistic, and will have a significant impact in hobbling routine police investigations and interrogations. In any large state, such as Texas or California,

the police forces from different local jurisdictions will often participate in investigating the same or related crimes. Whenever a suspect has moved to a new city, for example, or fled from one local jurisdiction to another while released on bail, a different police force may be called upon to arrest or interrogate a suspect on a new warrant when there has been a break in an unsolved case. Questioning a suspect swiftly to follow up on new leads can often be critical for solving the case. That is particularly true where, as here, the break in the case comes from a suspect's confession to a third party months after the crime. Following up on a suspect who is in a frame of mind to confess can often be the *only* way to resolve a case that might otherwise linger unsolved for years. Efforts to secure Cobb's confession were thus nothing less than effective and proper police work. As this Court has often pointed out, "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citation omitted). The fact that officers in an entirely different jurisdiction knew that Cobb had counsel on the burglary charge provides no sound basis for discarding the fruits of legitimate and good-faith police work.

Under the rule in this case, moreover, it would not be enough for officers in one jurisdiction simply to ascertain the objective facts about proceedings elsewhere – such as whether a suspect has been indicted on the particular charge they are investigating. In this case, for example, officers in Odessa received a statement from Cobb's father describing Cobb's confession to *murder* and arrested Cobb on a warrant for *murder*. Cobb had never been indicted for that crime. Yet the ultimate holding below was that his Sixth Amendment rights had attached anyway. Under that ruling, law enforcement officers in one local jurisdiction not only would have to

investigate scrupulously all the details of proceedings in another jurisdiction – to determine whether a suspect has been indicted on any crimes, whether counsel had been appointed, and whether the suspect ever asserted his right to counsel – but also would have to act essentially as lawyers to make the subtle determination whether the crime they were investigating was, under some vague standard, sufficiently "closely related" to a crime charged elsewhere for Sixth Amendment rights to extend to the new crime. It is wholly unrealistic to expect police to play such a role.

The only result of such a rule will be hobbling entirely legitimate and good faith police work. In this regard, it bears emphasizing that the officers who interviewed Cobb handled this case absolutely according to the book – there is not even a hint of police misconduct here, nor even of an error that the officers in Odessa could have avoided. To the contrary, the officers in Odessa fully complied with the requirements of *Miranda* before interviewing Cobb. Indeed, they adhered to a procedure under Texas law that is *more* protective of a suspect's rights than the guidelines established in *Miranda* and under which they advised Cobb of his rights in writing and received a written waiver signed before a witness. *See* Tex. Code Crim. Proc. Ann. art. 38.22, § 2. The expansive rules applied by the Texas Court of Criminal Appeals to suppress Cobb's statement in this case were thus particularly unwarranted, because the ordinary procedures police used fully protected Cobb's constitutional rights under this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF 19 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Capital Case

QUESTIONS PRESENTED

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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STATEMENT OF *AMICI* INTEREST

The State of Ohio and 18 other amici States and Territories write to urge the Court to grant certiorari in this case. At stake is the scope of the Sixth Amendment right to counsel where one suspect has committed two distinct – although temporally related – crimes. Some lower courts, including the Texas Court of Criminal Appeals in this case, have misinterpreted this Court's holding in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), by overlooking the "offense specific" nature of the Sixth Amendment. Just because a suspect's right to counsel has attached in connection with one of his crimes, the Sixth Amendment does not appear to bar the police from inquiring about all others. In addition, some lower courts, again including the lower court here, have expanded this Court's holding in *Michigan v. Jackson*, 475 U.S. 625 (1986), by finding an "assertion" of the right to counsel where an accused has made no affirmative statement at all about his need for legal help.

Two vital societal interests of importance to the States are at issue here: (1) the States' prerogative to investigate crime and convict the guilty and (2) the States' (sometimes countervailing) interest in protecting their citizens from police "badgering." These concerns are of particular moment where, as here, one person is accused of two factually related but legally distinct offenses. When can an accused effectively and voluntarily waive his right to counsel with respect to a particular offense after earlier accepting the appointment of counsel for another criminal charge? Where a properly Mirandized suspect is willing to talk about Crime A, are police forever barred from questioning him about it simply because a court has already appointed counsel for that suspect concerning Crime B? The States earnestly seek clear direction from the Court in this area of the law, which is now marked by considerable uncertainty and by conflicting

rulings in the lower courts. We therefore urge the Court to review the judgment below.

REASONS FOR GRANTING THE WRIT

Presented in this case is a new twist on the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986). Under *Jackson*, once a criminal defendant has asserted his right to counsel at an arraignment or similar proceeding, the police may not interrogate him without first securing the approval of his attorney. Even if the defendant knowingly and voluntarily agrees to the interrogation, *Jackson* bars the questioning, absent the consent of the defendant's attorney.

This case differs from the *Jackson* situation in two key respects, however. First, the police questioning at issue here concerned murder offenses that were legally distinct from – though factually related to – a previously-charged burglary offense on which defendant Cobb had earlier been arraigned, whereas *Jackson* concerned interrogation about the one and only crime with which the defendant in that case stood charged. Second, the defendant in this case merely accepted the appointment of counsel at his arraignment on the burglary charge, whereas the defendant in *Jackson* affirmatively requested counsel at his arraignment.

Once defendant Cobb had been appointed counsel on the burglary charge, could he, without first consulting his appointed attorney, knowingly and intelligently agree to police questioning about two unsolved murders? The Texas Court of Criminal Appeals said "no," finding that Cobb's Sixth Amendment right to counsel had attached to the murder charges once Cobb was arraigned on the burglary charge. That judgment now merits review.

I. The Court Should Grant Certiorari To Clarify That The Sixth Amendment Right To Counsel Is Offense Specific, And Police Are Not Barred From Interrogating A Suspect About A Crime Simply Because He Already Has Counsel For Some Other Criminal Charge.

Confusion haunts state and federal courts regarding the scope of the Sixth Amendment right to counsel where one suspect is implicated in two offenses. No case could better illustrate that confusion – and its destructive consequences – than this one. Respondent Cobb voluntarily confessed to two counts of capital murder after law enforcement officers fully explained his *Miranda* rights to him. However, because counsel had already been appointed for Cobb on a related burglary charge (unbeknownst to the officers to whom he confessed in another county), and because the interrogating officers failed to secure the attorney's permission before questioning Cobb about the murders, Cobb's confessions have been thrown out and his convictions vacated.

Let there be no mistake in this case: the murder charges are in no way predicated on the burglary. Neither Texas law nor the record disclose any element of the murder offenses that would also constitute an element of the previously-charged burglary offense (save the venue and date), and likewise, no element of the burglary offense overlaps with the essential elements of the murder charges. While the murders occurred during a sequence of events starting with defendant Cobb's burglary of a home, those murders remain factually and legally distinct from that first offense.

Under *McNeil v. Wisconsin*, the Sixth Amendment right to counsel is "offense specific." 501 U.S. 171, 175 (1991). Thus, in this case, the trial court's appointment of counsel for Cobb at his arraignment on the burglary charge

was limited to that charge alone, not to other offenses that he may have committed. The Texas Court of Criminal Appeals should have so held, thereby preserving the law enforcement officers' authority to investigate other crimes apart from the burglary, and allowing them to interview Cobb about other crimes if he knowingly and intelligently agreed to speak with them.

Instead, the court below applied a lawyer-for-one/lawyer-for-all approach to the additional criminal charges for which Cobb later became a suspect. The court cited what it described as a "Sixth Amendment rule that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is *very closely related factually* to the offense charged." Pet. App. at A-6 (emphasis added). In deciding whether the burglary charge and two capital murder offenses involving separate conduct and completely different elements constituted "very closely related" offenses, the Texas court observed only that the murders were "factually interwoven" with the burglary. Pet. App. at A-7.

The Texas court's error stems in part from analysis developed by lower courts before this Court's decision in *McNeil*. Those earlier decisions in turn rested on this Court's decisions in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Maine v. Moulton*, 474 U.S. 159 (1985). In *Brewer*, the suspect incriminated himself when the police – who had promised the suspect's lawyer that they would not question the suspect – prompted him to talk while riding in a police cruiser after his arraignment. That defendant already had a lawyer for a pending abduction charge, and he never agreed to waive his *Miranda* rights before talking with the police in the car. The Court found his incriminating words and actions inadmissible in a related murder case. In *Moulton*, police obtained admissions by surreptitiously recording a defendant's conversations with a co-defendant after the

defendant had been charged with theft and after a lawyer had been appointed for him. Again, this Court set aside the admissions and resulting convictions, holding that the police had violated the defendant's Sixth Amendment right to counsel. Those two cases together bar the government from "obtain[ing] incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Moulton*, 474 U.S. at 176.

In an effort to reconcile *Brewer* and *Moulton* with *Michigan v. Jackson*, 475 U.S. 625 (1986), and later with *McNeil*, state and federal courts weighing the Sixth Amendment rights of defendants facing multiple criminal charges have developed the "inextricably intertwined" or "related offenses" test as an exception to the "offense specific" holding of *McNeil*. In other words, when two offenses seem closely tied, courts are more likely to find that a lawyer who represents a defendant for his role in one offense also automatically represents him for any possible related cases, even though *McNeil* describes the Sixth Amendment as offense specific.

This Court has never determined whether this post-*McNeil* melding of legal representation for related offenses (and the resulting ban on police interrogation for the second offense, even where the accused knowingly and voluntarily wishes to speak with the authorities) is compelled by the Sixth Amendment. As one lower court has said, the "precise boundaries of the offense-specific limitation have yet to be fleshed out." *People v. Clair*, 828 P.2d 705, 721 (Cal. 1992), *cert. denied*, 506 U.S. 1063 (1993), quoting *McNeil*, 501 U.S. at 187 (Stevens, J., dissenting).

Unfortunately, that uncertainty has led to a result that does not advance the States' interest in protecting citizens from police overreaching (for here, the defendant knowingly

and intelligently agreed to speak with the police about the murders even though – unbeknownst to them – he already had a lawyer on his separate burglary charge), and surely frustrates Texas's interest in punishing a murderer (for the judgment below tossed out Cobb's confession and convictions). That outcome cannot be reconciled with *McNeil*'s requirement that the prophylactic Sixth Amendment protection articulated in *Jackson* be applied only on an "offense specific" basis.

Lower courts now need guidance in reconciling *Brewer* and *Moulton* with *McNeil* and the offense-specific language in *Jackson*. There is no reason why either *Brewer* or *Moulton* should compel exclusion of the confession here, for neither of those cases involved an admittedly voluntary confession by a suspect who had explicitly waived his *Miranda* rights and agreed to speak with the authorities about an offense different from the one on which he had been arraigned with counsel.

The existing offense-specific rule of *Jackson* and *McNeil*, operating in conjunction with the Fifth Amendment principles of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), is fully adequate to protect criminal suspects. The record here demonstrates as much: respondent Cobb, though fully apprised of his right to remain silent, opted to speak with the authorities about murders that he had committed nearly two years earlier. Just because he had confessed to a related burglary some seven months after committing both crimes, and though the trial court had appointed counsel for Cobb on that burglary charge, Cobb remained free to voluntarily speak with authorities about other crimes. No compelling interest of either criminal defendants or the States is served by a rule that bars the police from interrogating a suspect in this situation. The contrary decision of the court below now merits review.

II. The Court Should Grant Certiorari To Resolve The Current Uncertainty Surrounding A Criminal Defendant's Ability To Waive His *Miranda* Rights And Speak With The Police After A Trial Court Has Appointed Counsel For Him.

Besides the important constitutional question concerning the attachment of the right to counsel when one defendant is suspected of committing two distinct crimes (and the practical question concerning the ability of the police to interrogate in that situation once the defendant secures counsel for one of the charges), this case also raises a second significant issue. The court below held that defendant Cobb had "asserted" his right to counsel on any possible murder charges when he did nothing at his arraignment on the burglary charge except agree to the trial court's appointment of a lawyer for him on that latter charge. Pet. App. at A-7. And once that right to counsel on the murder charges attached, said the court, Cobb himself could not waive the right or speak with the police about the murders without first securing the burglary-charge lawyer's permission.

Perhaps a criminal defendant must affirmatively request counsel – as did the accused murderer in *Michigan v. Jackson*, 475 U.S. 625 (1986) – in order to trigger the ban described in that case against any future waiver by the defendant of his right to counsel for police-initiated interrogation. Perhaps instead a defendant's silent acquiescence in a trial court's appointment of counsel for him at his arraignment – the situation here – should lead to the same result, as the court below found. Lower courts are split on the issue, both in Texas and around the country, and the States urge the Court to grant certiorari in this case to resolve the conflict.

A. The Court Has Never Precisely Defined What Constitutes An "Assertion" Of The Right To Counsel.

In *Jackson*, the Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636. In so ruling, the Court imported into Sixth Amendment jurisprudence the "prophylactic" rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), which provides, in the Fifth Amendment context, that once an accused in custody expresses his desire to deal with police only through counsel, the accused is no longer subject to further police-initiated interrogation until he secures counsel. *See Jackson*, 475 U.S. at 626. The Court has distinguished the *Jackson* situation – where the accused "ha[d] asked for the help of a lawyer," 475 U.S. at 631 – from those post-indictment police interrogations where the accused "at no time sought to exercise his right to have counsel present." *Patterson v. Illinois*, 487 U.S. 285, 290 (1988). In the former situation, the interrogation is barred absent defense counsel's consent, while in the latter, the defendant may knowingly and intelligently waive his right to counsel at the questioning.

The key distinction, then, between permissible and impermissible post-indictment questioning is the defendant's request for legal assistance. But which side of the line does a case like this fall on, where the accused has not affirmatively requested counsel, but has agreed to a trial court's appointment of counsel for him? Perhaps, as in *Davis v. United States*, 512 U.S. 452, 459 (1994) (interrogation need not stop where suspect "makes a reference to an attorney that is ambiguous or equivocal"), the controlling constitutional principle ought to turn on the suspect's "actual[] request[] [for] an attorney." *Id.* at 462. In any event, clarification of

this issue is of fundamental importance to the States and their law enforcement officers, for now those officers can only guess whether they may accept at face value a defendant's apparently knowing and voluntary willingness to speak with them, or whether they must instead deal only with a lawyer whose help the defendant has never sought.

And the issue is particularly important here, where not only did defendant Cobb fail to affirmatively request counsel at his arraignment or at any other time, but also, that arraignment was of course for a different criminal charge than the one about which the police sought to question him months later once they suspected that he had not only burglarized a home, but had also murdered its two occupants. The right to counsel that the court below afforded Cobb appears to go beyond the limits set in earlier cases, and this case now provides a sound vehicle for addressing the scope and importance of a defendant's "assertion" of his right to counsel at arraignment.

B. Lower Courts Are Divided On The Question.

The lower courts need direction on this issue. Compare *Bradford v. State*, 927 S.W.2d 329, 333-34 (Ark. 1996) (suppressing defendant's statement made after the trial court appointed counsel for him), *cert. denied*, 519 U.S. 1028 (1996); *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989) (finding the record ambiguous as to whether a defendant was represented by counsel when police questioned him after the trial court had appointed counsel for him); and *Holloway v. State*, 780 S.W.2d 787, 795 (Tex. Crim. App. 1989) ("find[ing] no room for the State's argument that the Supreme Court would permit the police-initiated interrogation of an indicted accused who has retained or has been appointed defense counsel"); with *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992)

(magistrate's appointment of defense counsel did not bar further police-initiated interrogation), *cert. denied*, 506 U.S. 1036 (1992); *Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999) (same); *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997) (same), *cert. denied*, 523 U.S. 1008 (1998); *State v. Carter*, 664 So.2d 367, 370 (La. 1995) (same).

Within the State of Texas, where this case arose, state and federal courts appear divided. The Fifth Circuit requires "an actual, positive statement or affirmation of the right to counsel" by an accused before his Sixth Amendment right to counsel will attach. *Montoya*, 955 F.2d at 282. "For purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Id.* at 283 (quoting *Jackson*, 475 U.S. at 626). Using this definition, the Fifth Circuit determined that Montoya had "never asserted, or invoked, his right to counsel," *id.*, and so his post-arraignment confession to the police was admissible at trial.

In contrast, the state court of appeals in this case held that defendant Cobb had invoked his right to counsel simply by appearing at his arraignment. The uncertainty generated by these differing approaches both within Texas and elsewhere shows that guidance from this Court is needed now on this issue of great importance to the States.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the writ.

Respectfully submitted,

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June 2000

MOTION FILED

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No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,

v.

RAYMOND LEVI COBB,
Respondent.

On Petition for Writ of Certiorari to the
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MOTION FOR LEAVE TO FILE AND *AMICI CURIAE* BRIEF OF TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, FLORIDA PROSECUTING ATTORNEYS ASSOCIATION, INC., NEW MEXICO DISTRICT ATTORNEYS ASSOCIATION, AND WEST VIRGINIA PROSECUTING ATTORNEYS INSTITUTE, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to the Rules of the Supreme Court, Rule 37.2(b), the Texas Association of District and County Attorneys and other *amici curiae* respectfully request leave of the Court to file the accompanying brief of *amici curiae* in support of Petitioner.

CONSENT OF THE PARTIES

Petitioner's consent to the filing of the accompanying *amici curiae* brief has been sought and granted. Respondent, however, has withheld his consent.

STATEMENT OF *AMICI* INTEREST

The Texas District & County Attorneys Association is an organization that serves its members by producing comprehensive continuing legal education courses for employees in prosecutors' offices, providing technical assistance to the prosecution community and related criminal justice agencies, and serving as a liaison between prosecutors and other organizations involved in the day-to-day administration of criminal justice.

All *amici curiae* joining this brief are similar organizations composed of individuals whose professions involve the investigation and prosecution of criminal activity. As such, the *amici* are acutely interested in the fair and efficient administration of criminal justice. The *amici* believe that this brief will not duplicate those of the parties. Rather, as a broad-based coalition of criminal justice professional organizations, the *amici* believe that they offer a unique

perspective on the issues at stake and that such a perspective will be of assistance in the Court's resolution of the case.

The *amici* support the petition for writ of certiorari both because *Cobb* presents an opportunity for this Court to resolve an important constitutional question upon which numerous state and federal courts disagree, and because the decision of the Texas Court of Criminal Appeals is contrary to the decisions of this Court concerning the attachment of the Sixth Amendment right to counsel and the application of this Court's decision in *Michigan v. Jackson*, which protects Sixth Amendment rights by proscribing police-initiated interrogation outside the presence of counsel after an accused has actively invoked his Sixth Amendment right to counsel. The *Cobb* decision especially burdens the members of the *amici* organizations by further confusing an already unsettled body of case law in the federal and state courts applying *Michigan v. Jackson*. The *amici* respectfully ask that this Court grant the writ of certiorari in order to provide clear guidance to the law enforcement community concerning the administration of Sixth Amendment rights.

Respectfully submitted,

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This is a capital case.

Questions Presented

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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The *amici* support the petition for writ of certiorari both because *Cobb* presents an opportunity for this Court to resolve an important constitutional question upon which numerous state and federal courts disagree, and because the decision of the Texas Court of Criminal Appeals is contrary to the decisions of this Court concerning the attachment of the Sixth Amendment right to counsel and the application of this Court's decision in *Michigan v. Jackson*, which protects Sixth Amendment rights by proscribing police-initiated interrogation outside the presence of counsel after an accused has actively invoked his Sixth Amendment right to counsel.

The *Cobb* decision especially burdens the members of the *amici* organizations by further confusing an already unsettled body of case law in the federal and state courts applying *Michigan v. Jackson*. This confusion is especially tangible in Texas due to a split of authority between state and federal courts. The *amici* respectfully ask that this Court grant the writ of certiorari in order to provide clear guidance to the law enforcement community concerning the administration of Sixth Amendment rights.

Argument

I. THE PROPHYLACTIC RULE OF *MICHIGAN V. JACKSON* DOES NOT APPLY BECAUSE COBB NEVER INVOKED THE SIXTH AMENDMENT RIGHT TO COUNSEL PRIOR TO HIS CONFESSION.

The ruling of the Texas Court of Criminal Appeals in *Cobb v. State*, No. 72,807, 2000 WL 175644 (Tex. Cr. App. Mar. 15, 2000), frustrates effective law enforcement by its unwarranted overapplication of the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986). Once a suspect accused of a criminal offense actually invokes his Sixth Amendment right to counsel, *Michigan v. Jackson* protects that suspect from police overreaching by prohibiting police-initiated custodial questioning regarding the charge at issue. The Texas court purported to rely on this rule in overturning Raymond Cobb's conviction for capital murders; however, Cobb never invoked his Sixth Amendment right to counsel. Therefore *Michigan v. Jackson* did not apply. The only act identified by the Texas Court of Criminal Appeals by which Cobb allegedly invoked his Sixth Amendment rights was his acceptance of appointed counsel when he was initially

charged with burglary. *First*, that act could not have been an invocation of Sixth Amendment rights with respect to the capital murder charges because Cobb's right to counsel for the capital murder charges had not yet attached. *Second*, the mere act of accepting appointed counsel is not sufficient to invoke the prophylactic measures prescribed by *Michigan v. Jackson*.

A. Cobb's Sixth Amendment right to counsel on capital murder charges did not attach until the commencement of judicial proceedings against him on those charges.

Michigan v. Jackson did not preclude police officers from questioning Cobb about the Owings murders. Cobb had already confessed by the time his Sixth Amendment right to be represented by counsel on capital murder charges arose, and thus he never invoked the right so as to prompt the application of *Michigan v. Jackson*.

Sixth Amendment rights are offense-specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Thus when the Sixth Amendment right to counsel has been invoked by a criminal defendant with respect to certain charges against him, law enforcement officers are not constitutionally prohibited from questioning the defendant about separate, uncharged offenses. *See id.* at 175-76.

Moreover, the Sixth Amendment right to counsel does not attach to a specific offense until the commencement of adversary judicial criminal proceedings. *See United States v. Gouveia*, 467 U.S. 180, 188 (1984). The Sixth Amendment right to counsel "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, '"at or after the initiation of adversary

judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."'" *McNeil*, 501 U.S. at 175-76 (quoting *Gouveia*, 467 U.S. at 188 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion))).

When these bedrock Sixth Amendment principles are applied to the facts of this case, it is plain that Cobb's acceptance of appointed counsel to represent him on *burglary* charges could not constitute an invocation of Sixth Amendment rights with respect to later-filed *capital murder* charges. Cobb confessed to burglarizing the Owings household on July 15, 1994. One month later, on August 15, 1994, attorney Hal Ridley was appointed to represent Cobb, solely for the burglary charge. With the permission of his counsel, Cobb voluntarily spoke to police investigators several times about the Owings disappearances outside the presence of counsel.

Proceedings against Cobb on capital murder charges were not initiated until after Cobb's father called the Walker County Sheriff's Office on November 11, 1995 to report that Cobb had confessed to the murders. An arrest warrant was obtained, and the police informed Cobb of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Cobb waived those rights without any statement indicating a desire to be represented by counsel, and Cobb then confessed to murdering Maggie and Kori Rae Owings.

The essential holding of *Michigan v. Jackson* is that "after the Sixth Amendment right to counsel attaches *and is invoked*, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at

issue (even if the accused purports to waive his rights) are inadmissible." *McNeil*, 501 U.S. at 179 (emphasis supplied). Cobb had already confessed by the time his Sixth Amendment right to counsel attached with respect to the capital murder charges. As a result, the prophylactic rule of *Michigan v. Jackson* did not apply to the police questioning of Cobb and Cobb's statements to the police should not be suppressed.

To the extent that there may be an extension of Sixth Amendment rights from application in the context of one charged offense to that of a "very closely related" or "inextricably intertwined" separate offense, *see, e.g., State v. Frye*, 897 S.W.2d 324 (Tex. Cr. App. 1995); *United States v. Arnold*, 106 F.3d 37 (3d Cir. 1997), the prophylactic rule of *Michigan v. Jackson* should not be applied in such a fashion as to undermine legitimate police interrogation undertaken, as was the case with Cobb's various interrogations, when the police investigate in good faith and without any motive of subverting the Sixth Amendment rights of the accused. In this case, however, it would be inconsistent with the "offense specific" nature of the Sixth Amendment as described in *McNeil* to treat the offenses at issue as inextricably intertwined, dictating the prior attachment of Sixth Amendment rights.

The Court in *McNeil* made clear that "[t]he purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil*, 501 U.S. at 177-78 (quoting *Gouveia*, 467 U.S. at 189) (emphasis in original). The adverse positions of Cobb and the

State of Texas did not solidify with respect to the Owings murders until police learned of Cobb's confession. Accordingly, Cobb's Sixth Amendment rights respecting those charges did not arise until Cobb's indictment on capital murder charges. By that time, Cobb had already confessed the murders to the police. As a result, Cobb's confession was properly used to secure his conviction for two counts of capital murder and that conviction should not have been reversed by the Texas Court of Criminal Appeals on Sixth Amendment grounds.

B. Even if the burglary charges against Cobb caused his Sixth Amendment right to counsel to attach with respect to future capital murder charges, Cobb's mere acceptance of appointed counsel did not "invoke" the right for the purposes of *Michigan v. Jackson*.

Even if, as wrongly assumed by the Texas Court of Criminal Appeals, Cobb's Sixth Amendment right to counsel on capital murder charges attached when judicial proceedings began on related burglary charges, the questioning in this case was proper. The prophylactic rule of *Michigan v. Jackson* does not apply unless the accused "invokes" his Sixth Amendment rights. The ruling of the Texas Court of Criminal Appeals was based on the mistaken view that Cobb's mere acceptance of appointed counsel was sufficient for the *Michigan v. Jackson* rule to apply.

In the consolidated cases considered in *Michigan v. Jackson*, respondents Bladel and Jackson had requested appointment of counsel at their arraignments. Bladel asked about his representation several times, but he was not told that

a law firm had been appointed to represent him. Subsequently, officers questioned Bladel and extracted a confession from him. Similarly, Jackson was questioned by police after having requested counsel, but before having the opportunity to meet with counsel. Both Bladel and Jackson were advised of their *Miranda* rights before they were subjected to police questioning, but the Court decided that their waiver of the Sixth Amendment right to counsel was incompetent because the questioning took place after both respondents had actively (and unsuccessfully) sought the assistance of counsel.

As pointed out by the dissenting judges on the Texas Court of Criminal Appeals, Cobb's case is factually distinguishable from *Jackson*. Importantly, unlike the respondents in *Jackson*, Cobb "did not unequivocally assert his right to counsel at any time before the police-initiated interrogation." App. at A-21 & n.11. In contrast, the Fifth Circuit has recognized that passively accepting the appointment of counsel does not constitute the "actual, positive statement or affirmation of the right to counsel" required to invoke the *Michigan v. Jackson* rule. *See Montoya v. Collins*, 955 F.2d 279, 282 (5th Cir. 1992). Thus, if certiorari is not granted in this case, Texas state courts will view the mere acceptance of appointed counsel as an invocation of Sixth Amendment rights for the purposes of *Jackson*. This will cause a significant conflict among state- and federal-court interpretations of *Jackson* within the State of Texas.

The State's petition for a writ of certiorari demonstrates that courts are divided on this question of what type of statement by the accused is necessary to invoke the

prophylactic rule of *Michigan v. Jackson*. *Compare Dew v. United States*, 558 A.2d 1112 (D.C. 1989), *and Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Cr. App. 1989), *with Montoya*, 955 F.2d 279 (5th Cir. 1992), *and State v. Carter*, 664 So. 2d 367 (La. 1995). This split of authority creates a hopeless dilemma for law enforcement officers entrusted with the responsibility of investigating crimes and prosecuting the perpetrators. As noted above, this dilemma is not hypothetical, but is very real for law enforcement officials within the State of Texas. Moreover, the confusion caused by *Cobb* and other similar rulings extends beyond Texas to all law enforcement officers who may not know which jurisdiction, either among states or between state and federal courts, will ultimately review the constitutionality of an interrogation. The consequence is that uncoerced confessions and evidence obtained as a result thereof may be lost due to uncertainty in the law. Without new guidance to clarify what procedures are acceptable under the Constitution, investigating officers will be essentially left to their own devices in walking the minefield of potential procedural pitfalls under the Fifth and Sixth Amendments.

The mere acceptance of appointed counsel should not be sufficient to apply the prophylactic rule of *Michigan v. Jackson*. Unlike an affirmative request for help in the context of adversarial proceedings, merely accepting the appointment of counsel does not unequivocally signal a desire to communicate with police only through counsel. The application of the *Michigan v. Jackson* prophylactic rule under such circumstances undermines the ability of law enforcement officers to investigate crimes and secure convictions of the guilty, tipping the scales too far in favor of

an accused defendant who has never affirmatively sought protection from police questioning. The Court should grant a writ of certiorari in order to resolve the split of authority on this important question affecting the administration of justice, in order to provide proper guidance to law enforcement officers and prosecutors charged with carrying out the directives of *Michigan v. Jackson*.

II. THE PROPHYLACTIC RULE OF *MICHIGAN V. JACKSON* DOES NOT APPLY BECAUSE COBB WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

A criminal defendant, even one who has representation with respect to other charged offenses, can unilaterally waive his Sixth Amendment right to counsel and agree to answer questions from police officers. To the extent that Cobb's Sixth Amendment rights had attached with respect to the capital murder charges against him, he waived his rights by consenting to questioning by police about the Owings disappearances.

A. After Cobb was charged with capital murder and read his *Miranda* rights, he made a knowing, intelligent, and effective waiver of his right to counsel.

In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Court held that the *Miranda* warnings are sufficient to advise an accused of his Sixth Amendment right to have the assistance of counsel in interactions with the police. *See* 487 U.S. at 293-97. Moreover, if the accused is advised of his rights and he then voluntarily elects to answer police questions without requesting counsel, the accused's actions demonstrate a

knowing and intelligent waiver of his right to counsel, and the police are not prohibited from questioning him. *See id.*

After being arrested on charges of capital murder, Cobb was read his *Miranda* rights. He was then questioned in good faith by officers who did not have any reason to think that Cobb was represented by counsel. In fact, Cobb was not represented by counsel with respect to the capital murder charges, and he did not ask to speak to or wait for a lawyer. Though Cobb was represented by counsel for the temporally related burglary charge, the questioning officers did not know this and Cobb made no reference to that fact. If, as argued by the petitioner, *Michigan v. Jackson* did not apply, there can be no question that Cobb validly waived his right to counsel and his confession was properly used to secure his conviction.

B. By consenting to questioning about the Owings murders outside the presence of counsel, Cobb waived his Sixth Amendment right to counsel with respect to those yet-uncharged offenses.

Assuming, arguendo, that before Cobb was charged with capital murder his Sixth Amendment right to counsel had attached for those charges, Cobb waived that right by repeatedly submitting to police questioning about the disappearances outside the presence of his counsel.

The record plainly demonstrates that Cobb's lawyer was not (and did not even consider himself to be) representing Cobb on capital murder charges. When the police initially asked to speak to Cobb about the disappearances, both Cobb and his counsel consented on more than one occasion to questioning outside the presence of Cobb's counsel. These actions plainly demonstrated that Cobb did not have the

intention of communicating only with the assistance of counsel to the police about the Owings disappearances. In such a circumstance, the justification for the prophylactic rule of *Michigan v. Jackson* is not present, and the facts that Cobb was informed of his right to have the assistance of counsel and that he made a knowing and intelligent waiver of that right should be sufficient to establish an effective waiver.

Since Cobb plainly waived his right to counsel, the Court should grant a writ of certiorari to correct the Texas court's dangerous precedent and to provide more guidance regarding waiver of the right to counsel. There is no evidence that the police in this case schemed to deprive Cobb of his right to counsel or otherwise acted in bad faith. Allowing a murderer to escape judgment based on a true technicality would be utterly unjust. Perhaps more importantly, from a broader perspective, law enforcement officers and prosecutors must be able to rely on a facially valid waiver, such as the one obtained in this case, as a predicate to the investigation of crimes. If they cannot do so, they will run the risk of losing the ability to use fairly obtained evidence to bring criminals to justice.

Conclusion

The result reached by the Texas Court of Criminal Appeals will lead to continued confusion in the courts and in the law enforcement community about the proper application of the Sixth Amendment and this Court's ruling in *Michigan v. Jackson*. Law enforcement officials need clear guidance about the Sixth Amendment to enable them to carry out their duties and protect the public. The decision by the Texas Court of Criminal Appeals in *Cobb* is not mandated by this

Court's decision in *Michigan v. Jackson*, and it undermines the clear guidance on waiver provided by this Court in *Patterson* and *Brewer v. Williams*, 430 U.S. 387 (1977).

The Texas court was obliged to view the facts in the light most favorable to the trial court's decision not to suppress the evidence challenged in this case. The Odessa, Texas, police officers who questioned Cobb had absolutely no reason to believe that they could not proceed as they did, and they had no reason not to rely on Cobb's waiver of his Sixth Amendment rights when they questioned him about the Owings murders. There is not a scintilla of evidence to suggest that Cobb's confession was coerced or that the investigating officers otherwise acted in bad faith in this case. Yet, if the decision of the Texas Court of Criminal Appeals stands, there is a great possibility that a guilty murderer will not be effectively retried due to the prosecution's inability to use Cobb's confession and the physical evidence which was developed as a result of the confession.

This Court has recognized that "[t]he police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime.] . . . [T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *McNeil*, 501 U.S. at 175-76 (quoting *Maine v. Moulton*, 474 U.S. 150, 179-80 (1985)). In furtherance of that interest, the *amici curiae* submitting this brief respectfully ask that this Court grant certiorari in order to resolve the confusion in the courts and in the law enforcement community which has

resulted from decisions like this one from the Texas Court of Criminal Appeals.

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QUESTIONS PRESENTED

I.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when his eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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PETITIONER'S BRIEF

The fundamental question presented in this case is whether a criminal defendant, who has had unhampered access to counsel at every stage of a prosecution, may nonetheless choose to confess his guilt in a different, but related, crime. The Texas Court of Criminal Appeals erroneously held that Respondent Raymond Cobb's voluntary confession was taken in violation of his Sixth Amendment right to counsel and improperly reversed his capital murder conviction. The court erred for two independent reasons. First, Cobb's Sixth Amendment right had not yet attached when he confessed to the uncharged murders. Second, even if it had, the Sixth Amendment did not bar Cobb's waiver of his right to counsel (1) because he had not invoked the extraordinary protections of *Michigan v. Jackson*, 475 U.S. 625 (1986), and (2) because *Jackson* should be overruled.

CITATION OF COURT OF CRIMINAL APPEALS'S OPINION

Raymond Levi Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000).

BASIS FOR JURISDICTION

The Texas Court of Criminal Appeals decided *Cobb* on March 15, 2000. The State timely petitioned for writ of certiorari on April 21, 2000. SUP. CT. R. 13(1). This Court granted a writ of *certiorari* pursuant to 28 U.S.C. §1257(a) on June 26, 2000. *Texas v. Cobb*, 120 S.Ct. 2716 (2000).

CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. CONST. amend VI.

STATEMENT OF THE CASE

Early on a Monday morning in 1993, two days after Christmas, Lindsey Owings kissed his sleeping wife, Maggie, and his sleeping sixteen-month-old daughter, Kori Rae, goodbye and left for work. He never saw them again.

In the late morning or early afternoon of December 27, the Owings's neighbor Raymond Cobb burglarized the Owings's home, stealing a VCR, a stereo, some Walt Disney videotapes, and a bottle of tequila. In the course of that burglary, Cobb stabbed Maggie to death and buried her and Kori Rae in a wooded area about a mile from the house. Kori Rae was alive when Cobb buried her, but she soon suffocated in her own grave.

When Mr. Owings arrived home after work, his wife and daughter were gone. Aside from the few missing items, there were no signs of a struggle or foul play. He reported the burglary and the disappearances to the Walker County police. The police searched the surrounding area, canvassed the neighbors, and published fliers with photos of Maggie and Kori Rae, but no trace of them was found.

In February 1994, detectives received an anonymous tip that Cobb had been seen with the stereo stolen from the Owings's home. Cobb initially denied involvement in the burglary, but eventually admitted that he had burglarized the Owings's home. Cobb made a voluntary, written statement to that effect in July 1994, but continued to deny any involvement in the disappearances.

Based on his statement, Cobb was indicted for burglary. In August 1994, the district court appointed an attorney, Hal Ridley, to represent Cobb. Pet., at B-2.[1] Ridley's representation of Cobb was limited, by Ridley's own

[1] Relevant portions of Ridley's suppression hearing testimony are transcribed in an appendix to the petition for writ of certiorari (Pet. B).

admission, to the pending burglary charge. *Id.* Based on his conversation with Walker County District Attorney David Weeks, Ridley understood that Cobb was not yet a suspect in the disappearances, but he knew that the police believed Cobb knew more than he was saying. Pet., at B-3. This was important to Ridley, because Ridley had recently been involved in a capital murder trial and "really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect." *Id.*

For the next fourteen months, detectives continued to investigate the disappearances. On two occasions, the detectives asked Ridley for permission to question Cobb about the disappearances. The first of these occasions was at Cobb's arraignment for burglary, shortly after Ridley was appointed. Pet., at B-5. When asked for permission to talk to Cobb, Ridley stated, "I gave my permission and told them that it wasn't necessary for me to be there." *Id.* The second occasion was in September 1995, when Ridley again gave his permission for Cobb to be interrogated about the disappearances outside Ridley's presence. *Id.*, at B-5 to B-6.[2]

Some time after Cobb was released on bond, he moved to Odessa, Texas, where his father, Charles, lived. On November 11, 1995, Charles telephoned Walker County detective Judy James, the lead investigator on the case, and told her that Raymond had confessed to killing Maggie and Kori Rae. James advised Charles to make a statement to the Odessa police, and he did. The Odessa police faxed Charles's statement to James and she used it to obtain an arrest warrant for Raymond, which she then faxed back to Odessa. *See* R.17.147-48; 19.451-53.

[2] On the second occasion, Cobb led investigators through a wooded area near the Owings's residence, retracing his steps during the burglary. A subsequent search of the area with cadaver dogs uncovered no evidence, however.

By then, Odessa detectives Vic Sikes and Harold Thomas had already ascertained Cobb's whereabouts. On the morning of November 12, the detectives arrested Cobb, Mirandized him, and brought him to the police station. They telephoned James and informed her that they had Cobb in custody. When they asked her if they could question him, James agreed. The detectives were not aware that Cobb was represented by an attorney on the previous burglary charge. R.17.148-51,196.

Detectives Sikes and Thomas brought Cobb to an interview room and Mirandized him again. Beginning around 3 a.m., Sikes questioned Cobb for approximately an hour, without success. Cobb never indicated that he was tired and in fact told the officers that "he usually slept during the day and stayed up most of the night." R.2.366. After a five-minute break, Thomas took over questioning. Ascertaining that Cobb was a churchgoer, Thomas spoke to Cobb about his faith. This approach worked, and Cobb soon confessed to the murders. R.17.149-61. Both orally and thereafter in writing, Cobb explained that on December 27, 1993, he had entered the Owings's home and begun removing the stereo. When Maggie Owings confronted him, Cobb stabbed her in the stomach with a double-edged knife he was carrying. Cobb then dragged her body to a wooded area several hundred yards from the house. He described the ensuing events:

> "I went back to her house and I saw the baby laying in its bed. I took the baby out there and it was sleeping the whole time. I laid the baby on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and started digging a hole between them. After I got the hole dug the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then." *See* R.18.230-32; State Exh. 20.

Afterwards, Cobb returned to the Owings's house and completed his theft of the stereo, VCR, videotapes, and the bottle of tequila. Cobb stated that he had been drinking beer and tequila and smoking marijuana that day and "had a pretty good buzz." R.18.232.

Cobb confessed just after 5 a.m. on the morning of November 12, 1995. He said that he thought he still had the murder weapon and consented to a search of his home in Odessa, accompanying Sikes and Thomas there around 6 a.m. Cobb was unable to find the knife, but the detectives did seize nearly twenty other knives and swords, local newspaper articles about the disappearances that Cobb had kept since 1993, and several Walt Disney video tapes. R.2.373. Cobb also retrieved a gold ring that he gave to the officers, saying, "This is the wedding band that I took off Margaret Owings when I killed her." R.17.166-67.

Around 9 a.m., Cobb was arraigned on capital murder charges in Odessa. Cobb was then flown, with Thomas and Sikes, to Walker County, where they were met by Walker County investigators and a justice of the peace. Cobb was arraigned again at the airport and told the arraigning judge that "he just couldn't live with this any more." R.2.236. He was then taken to the Owings's residence, where he led the police to the wooded area where he had buried Maggie and Kori Rae. As crime technicians began to secure the grave, Cobb was taken to jail and booked. Not once—from the time Cobb was arrested through the time he showed police the burial site—did he ever indicate that he wanted to speak to an attorney or that he was represented by an attorney on the burglary charge. *See* R.18.287-89.

That evening, just near dark, the crime technicians found clothing and bone fragments that were later determined to

belong to Maggie Owings. They found Kori Rae's clothing, but no sign of her body. Later that evening, Walker County District Attorney Weeks telephoned Hal Ridley, Cobb's attorney for the burglary charge, and told him what had transpired. Pet., at B-9.

Ridley met with Cobb in jail the next day. While there, Ridley talked with the Walker County investigators. Regarding that conversation, Ridley testified:

> "In fact [Walker County detective] Judy [James] asked me if I was going to be representing him. I told her I didn't know. I was his lawyer for the burglary case; that, you know, that decision hadn't been made to my knowledge yet, but we talked a little bit." Pet., at B-10.

Either that evening or the following evening, investigators contacted Ridley and asked permission to bring Cobb back to the grave site.[3] The crime technicians had been unable to find any sign of Kori Rae's body and hoped that Cobb could provide assistance. Ridley agreed to let Cobb help, but Cobb was unable to lead the investigators to the girl's remains.[4]

On the evening of the 14th, Ridley was summoned to jail to help Cobb cope with "emotional problems" and shortly thereafter Ridley was appointed to represent Cobb on the murder charges:

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[3] The suppression hearing testimony of Ridley and James seems inconsistent regarding the date that Cobb was brought back to the grave site after being booked. James testified that this occurred on the evening of November 13, R. 2.246-47, but Ridley seemed to testify that it occurred on the evening of November 14, Pet., at B-10. The inconsistency appears entirely inadvertent and, in any event, the date is irrelevant since it is undisputed that Ridley consented to the officers' request to bring Cobb back out to the grave. Pet., at B-10 to B-11.

[4] Expert testimony during trial established the likelihood that Kori Rae's body was either entirely consumed by scavengers or that her immature bones simply disintegrated in the decomposition process. R.19.404-05.

> "A: . . . And ultimately, I was appointed to represent him, and after that I pretty much—well, after that I pretty much cut off the (sic) any more contact that he had with law enforcement.
>
> Q: To the best of your knowledge he has not had any further contact?
>
> A: Shouldn't have had after the 14th. If he did, it was without my permission." Pet., at B-11.

Before Cobb's capital murder trial began, the defense moved to suppress his confession as having been obtained in violation of, *inter alia*, the Sixth Amendment. After a hearing, the trial court denied the motion to suppress. *See* Pet. D. The jury found Cobb guilty of capital murder and Cobb was assessed the death penalty. *See* Pet., at E-7; Pet. F.

In a 6-3 decision, the Texas Court of Criminal Appeals reversed Cobb's conviction and remanded for a new trial. *See Cobb v. State*, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc) (Pet. A). The court found that Cobb's Sixth Amendment right to counsel, which had attached when Cobb was indicted for burglary, also attached to the murder investigation because the two offenses were "factually interwoven." Pet., at A-7. The court also determined that Cobb had "asserted" his Sixth Amendment right to counsel "by accepting Ridley's appointment as his counsel." *Id.* These facts, the court reasoned, implicated the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), and barred Cobb's unilateral waiver of his right to counsel during the November 12, 1995 interrogation. In vigorous dissent, Judges McCormick, Keller, and Keasler would have found that: (1) *Michigan v. Jackson* did not apply to these facts and that Cobb had validly waived his Sixth Amendment right to counsel under *Brewer v. Williams*, 430 U.S. 387 (1977), and made a voluntary confession, and (2) in any event, under *McNeil v. Wisconsin*, 501 U.S. 171 (1991),

Cobb's Sixth Amendment right to counsel had not attached with regard to the capital murder offense at the time he confessed. Pet., at A-25 & n.20.

SUMMARY OF ARGUMENT

Cobb's murder confession was properly admissible because he made a voluntary, intelligent, and knowing waiver of his right to counsel before confessing. The Sixth Amendment did not bar Cobb's confession because:

- The Sixth Amendment right to counsel had not attached to the murder charges when Cobb confessed. It had attached only to the burglary for which Cobb had been indicted over a year earlier. The Sixth Amendment's protections are offense specific and therefore did not bar Cobb's confession to the separate, uncharged murders.
- Alternatively, Cobb validly waived his right to counsel. *Michigan v. Jackson* rested on weak premises and was ill-fitted to the Sixth Amendment context. Subsequent decisions have abandoned *Jackson*'s analytical framework. *Jackson*'s promised safeguards against police coercion are superfluous because they duplicate the protections afforded by *Edwards v. Arizona* in the Fifth Amendment context. *Jackson* is a dead letter and should be overruled.
- Even if *Jackson* is still good law, Cobb never triggered *Jackson* by invoking his right to counsel. Cobb's mere acceptance of appointed counsel on the burglary charge was not a sufficiently clear and unambiguous assertion that Cobb desired the buffer of counsel during future custodial interrogation. Cobb never objected to this questioning and never invoked his right to counsel. *Jackson* therefore did not bar his waiver.
- Even if Cobb invoked his right to counsel and triggered *Jackson*, Cobb was free from police custody for fifteen months before he confessed to the murders. This lengthy break in custody, during which Cobb consulted with counsel, eliminated the inherently compelling pressures of continued custody and dissolved the *Jackson* bar.

ARGUMENT

I. COBB'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD NOT YET ATTACHED TO THE MURDER CHARGES WHEN COBB CONFESSED.

The Court may resolve this case on the basis that Cobb was not entitled to the benefits of the Sixth Amendment right to counsel at the time he confessed to the murders. The Texas Court of Criminal Appeals reasoned that, when Cobb was indicted for burglary, his Sixth Amendment right to counsel also automatically attached to the capital murder offense because it was "factually interwoven with the burglary." Pet., at A-7. The court relied on the purported rule that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." Pet., at A-6 (citing *State v. Frye*, 897 S.W.2d 324, 328-29 (Tex. Crim. App. 1995); *Upton v. State*, 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993); *United States v. Arnold*, 106 F.3d 37, 41 (CA3 1997)).

The court erred by expansively applying an "exception" to the general rule of Sixth Amendment attachment that (1) is based on a misreading of the Court's precedents, and (2) disrupts the balance the Court has already struck between a criminal defendant's right to the assistance of counsel as to a charged offense and the government's interest in investigating additional, uncharged criminal activity.

A. State and Federal Courts Have Developed an Amorphous, Multifactor Exception to the Court's Bright-Line Rule that the Sixth Amendment Attaches Only to a Charged Offense.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This guarantee applies to the states via the due process clause of the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Due process also requires that state courts appoint counsel for criminal defendants who cannot afford it. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

A criminal defendant's Sixth Amendment right to counsel arises in advance of his actual trial. It attaches upon the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The right, however, protects defendants only at postattachment proceedings deemed "critical" because their "results might well settle the accused's fate and reduce the trial to a mere formality." *See United States v. Wade*, 388 U.S. 218, 224 (1967); *see also United States v. Gouveia*, 467 U.S. 180, 189 (1984). Postattachment police interrogation is considered a critical stage at which an accused is entitled to the assistance of counsel. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

Attachment of the Sixth Amendment right to counsel grants a defendant certain heightened protections. Following attachment, if a defendant "asserts" his right to counsel at an arraignment or similar proceeding, the police may not thereafter approach the defendant outside the presence of counsel and secure a waiver of his right to counsel. Any such

waiver, even if valid under ordinary standards, will be presumed invalid. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

The Sixth Amendment right to counsel, as well as the *Jackson* fence around it, are offense specific. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). This is so because the right itself springs into existence only when the government initiates a criminal prosecution for a particular offense. *Id.* Thus the protection afforded by the right to counsel, by definition, only covers the substance of the "formal charge, preliminary hearing, indictment, information, or arraignment" that heralds, and limits, a criminal prosecution. *Id.* (quoting *Gouveia*, 467 U.S., at 188).

In *Maine v. Moulton*, the Court confirmed this principle and explained some of its consequences:

> "[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached–at the time the evidence was obtained, *simply because other charges were pending at that time*, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements *pertaining to pending charges* are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to counsel." 474 U.S. 159, 180 (1985) (emphasis added).

See id., at 179 (police "have an interest in the thorough investigation of crimes for which formal *charges* have already been filed" but "also in investigating new or additional crimes"); *id.*, at 179-80 (Sixth Amendment limits police investigative powers when "seeking evidence pertaining to pending *charges*"); *see also McNeil*, 501 U.S.,

at 179 (stating that *Jackson* precludes subsequent questioning "regarding the *charge at issue*"); *Jackson*, 475 U.S., at 632 (right to counsel triggered "after formal accusation has been made"); *id.*, at 633 (presuming that a defendant "requests a lawyer's services at every critical stage of *the prosecution*") (emphasis added). The charge-limited nature of the Sixth Amendment right to counsel contrasts with the Fifth Amendment's proscription of compelled self-incrimination: the Fifth Amendment is not offense specific, and, once invoked, it forbids questioning as to any offense, whether charged or uncharged. *See McNeil*, 501 U.S., at 177; *Arizona v. Roberson*, 486 U.S. 675, 678 (1988); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

Over the last decade, state and federal courts have improperly divined in two of the Court's precedents—*Brewer* and *Moulton*—an implicit, unstated exception to the bright-line rule that the Sixth Amendment right to counsel attaches only to the charged offense. *See generally United States v. Covarrubias*, 179 F.3d 1219, 1224-25 (CA9 1999); *United States v. Melgar*, 139 F.3d 1005, 1012-13 (CA4 1998); *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223-25, 1228 (Mass. 1997). Variously denominated as the "inextricably-intertwined," "closely-related," "very-closely-related," and "extremely-closely-related" exception, courts have generally determined that some degree of factual relatedness between a charged and an uncharged offense will cause the right to counsel to attach to *both* offenses. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 232-26 (Md. 1995) (collecting cases).

A recent Ninth Circuit decision provides a comprehensive—and complex—catalog of the factors undergirding the purported exception:

> "Deciding whether the exception is applicable requires an examination of all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes. No single factor is ordinarily dispositive; nor need all of the factors favor application of the exception in order for the offenses to be deemed inextricably intertwined or closely related—which concepts we, like some of the other circuits, deem to be the same. The greater the commonality of the factors and the more directly linked the conduct involved, the more likely it is that courts will find the exception to be applicable." *Covarrubias*, 179 F.3d, at 1225 (citations omitted).

Covarrubias also relied heavily on the "continuing nature" of the two offenses. *Id.*, at 1225-26 ("the continuous course of conduct [of the two offenses] would be controlling"); *see also Arnold*, 106 F.3d, at 41 (looking to "similarities of time, place, person, and conduct" to determine "whether the same acts and factual predicates underlie both the pending and the new charges").

In contrast to the broad approach in *Covarrubias*, other courts have narrowly scrutinized the "conduct" underlying two separate charges to determine whether they are closely related. *See, e.g. United States v. Williams*, 993 F.2d 451, 456 (CA5 1993); *United States v. Cooper*, 949 F.2d 737, 743-44 (CA5 1991); *People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988). Several courts have also focused on the degree of police misconduct associated with the tainted interrogation. *See, e.g., United States v. Martinez*, 972 F.2d 1100, 1105-06 (CA9 1992); *United States v. Hines*, 963 F.2d 255, 258 (CA9 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339, 1342-43 (CA10 1991). Other courts have inquired "whether the statements elicited by the police constituted evidence of both offenses." *Whittlesey*, 665 A.2d, at 235 (citing *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992)); *see also Melgar*, 139 F.3d, at 1015 (requiring defendant to show

additionally that "the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses").

B. The Court's Precedents Support No Exception to the General Rule that the Sixth Amendment Attaches Only to the Charged Offense.

This multiheaded exception springs from a widespread misreading of the Court's decisions in *Brewer* and *Moulton*. Both cases are entirely consistent with *McNeil*'s offense-specific rule and cannot support the open-ended exception widely employed by lower courts. Significantly, a leading case has doubted whether this Court's precedents compel the exception at all. *Whittlesey*, 665 A.2d, at 233 & n.8.

1. Neither *Moulton* Nor *Brewer* Supports An Exception to *McNeil*.

In *Moulton*, the primary source of the so-called exception, Moulton and Colson were indicted on four counts of theft for having "received, retained, or disposed of" three automobiles and assorted auto parts. 474 U.S., at 162. Colson decided to cooperate with the police and confessed that he and Moulton, in addition to the charged thefts, had also broken into a local dealership to steal the auto parts. *Id.*, at 162-63. Colson added that he had received anonymous threats concerning the pending charges and that Moulton had suggested they kill one of the state's witnesses. *Id.* When a tap on Colson's phone conversations with Moulton revealed nothing inculpatory, Colson consented to wear a body wire to a meeting with Moulton. *Id.*, at 163-65. Ostensibly, the wire was intended to protect Colson and gather evidence about Moulton's plan to kill the witness, but the police also admitted that they were "aware that Moulton and Colson were meeting to discuss the charges for which Moulton was under indictment." *Id.*, at 165. The two men met and, as the police expected, engaged in "a prolonged discussion of the pending charges." *Id.*

"[M]uch of the discussion," the Court observed, "involved recounting the crimes" in great detail, largely at Colson's prompting. *Id.* The men even spun a plan to create false alibis for their defense at trial. *Id.*

Based on the new evidence, the state dismissed the pending charges and obtained seven new indictments against Moulton: (#1-#4) for the previous theft charges; (#5) for burglary of the dealership where the auto parts were kept; (#6) for arson of one of the stolen vehicles; and (#7) for three more thefts. *Id.*, at 167. Moulton pleaded guilty to some of these charges, and the trial court dismissed others for improper venue. *Id.* The case then proceeded to a bench trial "on the remaining three indictments, which covered the subjects of the original indictments and charged him with burglary, arson, and theft." *Id.* The state introduced as evidence portions of the surreptitiously recorded meeting with Colson, "principally those [portions] involving direct discussion of *the thefts for which Moulton was originally indicted*." *Id.* (emphasis added). The court acquitted Moulton of arson, but found him guilty of "burglary and theft in connection with the Ford pickup truck, the Chevrolet dump truck, and the Ford automotive parts." *Id.*

The Supreme Judicial Court of Maine reversed Moulton's convictions, finding that use of the recordings at trial violated his right to counsel, because they were made under circumstances where the state knew or should have known that "Moulton would make incriminating statements *regarding crimes as to which charges were already pending*." *Id.*, at 167-68 (emphasis added). This Court agreed. The Court reasoned that the Sixth Amendment imposes on the government "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.*, at 171. The Court characterized the recordings as the fruit of "knowing exploitation by the State of an opportunity to confront the accused without

counsel being present," and concluded that the use at trial of Moulton's incriminating statements violated the Sixth Amendment. *Id.*, at 176.

The final section of the Court's opinion rejected the argument that the incriminating statements should not be suppressed because the police had obtained them in a legitimate effort to uncover evidence of Moulton's alleged plan to murder a witness. *Id.*, at 178. The Court reiterated its statement in *Massiah* that even legitimate police investigations are limited by an accused's Sixth Amendment rights. *Id.*, at 179 (quoting *Massiah*, 377 U.S., at 207). The Court carefully noted, however, that the rule in *Moulton* would exclude only "incriminating statements pertaining to *pending charges* . . . at the trial of those charges" and would not exclude "evidence pertaining to charges as to which the Sixth Amendment had not attached at the time the evidence was obtained." 474 U.S., at 180 (emphasis added); *see also id.*, at 180 n.16 ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those charges.").

Contrary to *McNeil*'s plain holding, some courts have mined the closely-related exception from a solitary aspect of *Moulton*: that the Court affirmed the reversal of Moulton's convictions for *both* theft *and* burglary, even though the initial charge was only for theft. *See, e.g., Covarrubias*, 179 F.3d, at 1224; *Melgar*, 139 F.3d, at 1013; *Clankie*, 530 N.E.2d, at 451. From this, courts have reasoned that the Sixth Amendment must also attach to some class of uncharged offenses that are "so closely related" to the charged offense that they "cannot be constitutionally isolated" from the right to counsel for the charged offense. *See Clankie*, 530 N.E.2d, at 451. The courts have distinguished the burglary of the auto parts in *Moulton*—which, they say, "occurred at the same time and place and involved the same victims and

circumstances" as the charged theft—from Moulton's plan to kill the witness, which "was planned at a different time and place, and involved a different victim." *Melgar*, 139 F.3d, at 1013 n.1; *see Covarrubias*, 179 F.3d, at 1224. Finally, the courts have intuited these principles while admitting that *Moulton* never states that the right to counsel attached to the burglary charge, and does not contain a single word about the "relatedness" between the burglary and theft charges. *See Melgar*, 139 F.3d, at 1013 (closely-related exception is recognized "sub silentio" by *Moulton*). In fact, a review of the briefs before the Court in *Moulton* shows that the issue of attachment to the burglary charge was never raised or discussed.

Moulton supports no closely-related exception whatsoever. Instead, *Moulton* itself is consistent with and implicitly relies on *McNeil*'s offense-specific definition of the scope of the Sixth Amendment's protection. The lower courts' wholesale adoption of the erroneous closely-related principle (dating back to *dicta* in the Supreme Court of Illinois's 1988 decision in *Clankie*) is the result of two basic errors.

First, the courts have overlooked the fact that a Sixth Amendment violation occurs only when the government improperly obtains evidence pertaining to a pending charge and admits the evidence at trial to prove *that previously charged offense*. *Moulton* itself is replete with proof of this principle. Its opening paragraph posits the issue as whether Moulton's right to counsel was violated "by the *admission at trial* of incriminating statements . . . made by him to his codefendant . . . after indictment and at a meeting of the two to plan defense strategy for *the upcoming trial*." 474 U.S., at 161 (emphasis added). The Court's description of the secretly obtained evidence hammers home its relevance to the *pending theft charges*: the Court noted that Colson recorded "a prolonged discussion of *the pending charges*—what actually had occurred," that the two men "discuss[ed] the

case" and planned their defense strategy for trial, and that "much of their discussion involved recounting the crimes." *Id.*, at 165-66. The Court carefully noted that "[e]ach of these [incriminating] statements was later admitted into evidence against Moulton at trial" and, crucially, that the recorded portions used were "principally those involving direct discussion of *the thefts for which Moulton was originally indicted*." *Id.*, at 166-67 (emphasis added). Finally, in its conclusion, the Court explained that "incriminating statements *pertaining to pending charges* are inadmissible at the trial of *those charges*" if the police violated the defendant's right to counsel in obtaining that evidence. *Id.*, at 180 (emphasis added). The courts could declare that the Sixth Amendment reaches uncharged, related offenses only by ignoring *Moulton*'s consistent linking of the Sixth Amendment violation to the pending charges.

Second, the lower courts have overlooked the fact that Moulton was tried for theft and burglary *in the same proceeding*. *See id.*, at 167 ("Moulton . . . proceeded to trial on the remaining three indictments, which . . . charged him with burglary, arson, and theft."). The illegally obtained statements, which were inadmissible at Moulton's trial on the theft charge, also constituted the key evidence that Moulton had committed the burglary. *See id.*, at 165-66 & n.5. This explains the result in *Moulton*. Moulton's right to counsel was violated because the prosecution introduced the recorded statements at trial to prove the previously charged *theft* offense. But his *burglary* conviction also depended on this impermissible evidence and had to be reversed as well.

Moulton does not support an exception to the general rule of Sixth Amendment attachment. Although *Moulton* is plain enough, the Court clarified that proposition in *Moran v. Burbine*, 475 U.S. 412 (1986), which described *Moulton* as having "considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to

two crimes. For one, the defendant had been indicted; for the other, he had not." *Id.*, at 431. When discussing the "two crimes," *Moran* was referring to the initially charged theft and the as-yet-uncharged murder conspiracy. *See id.* (discussing the "former" crime as one for which defendant "had been indicted" and as relating to the "first charging proceeding"); *id.* (observing that the evidence would be admissible as to the second, unindicted crime); *see also Moulton*, 475 U.S., at 162 (original indictment for theft); *id.*, at 180 & n.16 (discussing unindicted conspiracy to murder). *Moran* said nothing about the burglary charge, nor did it hint that Moulton's Sixth Amendment right to counsel had somehow attached to the burglary. Instead, *Moran* focused on the only two offenses that are relevant in *Moulton*: the charged theft and the uncharged conspiracy. *Moran* strongly reaffirms that *Moulton* erected no "sub silentio" exception to the general bright- line rule of Sixth Amendment attachment.

Brewer is even weaker authority for an exception to *McNeil*. Lower courts have found license to mint the exception from the following aspects of *Brewer*: (1) Williams was arrested and arraigned on an abduction charge, based on a witness's testimony that Williams had placed in his car a bundle containing what appeared to be a child missing from the YMCA where Williams resided; (2) the police explicitly agreed with Williams's two attorneys not to interrogate him on the 160-mile car trip back to the police station, but did anyway by piquing Williams's religious sensibilities with the so-called "Christian burial speech," prompting him to lead the officers to the child's body; and (3) the Court ruled that Williams's subsequent trial for first-degree murder based on the illegally obtained evidence violated his right to counsel. 430 U.S., at 390-94, 398-401. Courts have reasoned that *Brewer* must have "implicitly recognized, though without discussion" the principle that the Sixth Amendment attached both to the charged abduction and the subsequently tried murder. *Clankie*, 530 N.E.2d, at 451; *see Covarrubias*, 179

F.3d, at 1224 (abduction and murder in *Brewer* "involv[ed] the same incident and victim"); *Melgar*, 139 F.3d, at 1013 n.1 (right to counsel also attached to "later-charged, closely-related, crime of murder").

Brewer does not discuss whether Williams's right to counsel attached to both the abduction and the first-degree murder charges, nor whether the two offenses were related in any factual or legal sense. In fact, *Brewer* was concerned with quite a different matter: whether the government had proven Williams's effective relinquishment of his right to counsel by demonstrating that Williams responded affirmatively to the officer's statements. 430 U.S., at 401-06. As to attachment, however, *Brewer* merely applied the now familiar rule that the Sixth Amendment attaches upon initiation of criminal judicial proceedings. *Id.*, at 398 (citing, *inter alia*, *Kirby*, 406 U.S., at 689). Indeed, the state conceded that Williams's Sixth Amendment right to counsel had attached to the murder charges. *Id.*, at 399.[5]

In sum, neither *Moulton* nor *Brewer* can bear the weight of the closely-related exception that has been attributed to them for over a decade. Consideration of *Moulton* and *Brewer* makes clear that the exception is unwarranted.

2. The Court's Precedents Establish a Sensible Rule of Attachment, Tempered by a Same-Elements Protective Rule.

The Court's decisions in *Massiah*, *Moulton*, and *McNeil* support a more balanced rule of Sixth Amendment attachment. Any rule of Sixth Amendment attachment must address two competing interests: the accused's right to the assistance of counsel at critical stages of a particular criminal prosecution, and the government's interest in amassing

[5] As in *Moulton*, the briefs in *Brewer* do not discuss or suggest an exception to the Sixth Amendment's charge-specific nature.

evidence of new or additional crimes the accused has committed or may be planning to commit. *See Moulton*, 474 U.S., at 179-80. The Court's precedents already contain a principled rule that protects both interests—the charged-offense rule suggested by *Massiah* and *Moulton* and confirmed by *McNeil*. Under this straightforward rule, if a defendant has been indicted for an offense and the police elicit evidence from the defendant without securing a valid waiver of the right to counsel, the prosecution violates the Sixth Amendment and may not then introduce that improperly obtained evidence at the trial of the pending charge. The charged-offense rule, and a common-sense corollary described below, answer the concerns the courts have attempted to address through the closely-related exception. Unlike that standardless test, however, the charged-offense test finds substance in the balance the Court has already struck between the accused and the government.

McNeil best explicated this principle by linking the scope of the Sixth Amendment protections to the scope of the "adversary judicial proceedings" that trigger attachment of the right itself. *See* 501 U.S., at 175 (citing *Gouveia*, 467 U.S., at 188, and *Kirby*, 406 U.S., at 689). Those Sixth Amendment protections, as *McNeil* confirmed, are therefore offense specific. *Id.* In other words, because the Sixth Amendment protects a defendant's right to counsel in adversary criminal proceedings, it would not be appropriate to extend those protections to crimes for which there is no criminal proceeding. Until the police bring a charge, there is simply no Sixth Amendment right to counsel to protect.

The charged-offense rule flows directly from this principle. The police have an interest in investigating new and additional crimes, even those committed by a defendant currently under indictment. Crucially, *McNeil*'s discussion of offense specificity was directly responsive to the principle recognized by *Massiah* and *Moulton* that the police have a

legitimate interest in investigating uncharged crimes as to which the Sixth Amendment has not yet attached. *Id.*, at 175-76 (citing *Moulton*, 474 U.S., at 179-80; *Moran*, 475 U.S., at 431). The police's investigatory powers, however, are limited by the Sixth Amendment right to counsel. But the protections afforded by the right to counsel are only as broad as the formal criminal prosecution that triggered the right in the first place. Once the right is properly invoked, the government may not improperly interrogate a defendant charged with an offense and then use the fruits of the interrogation to convict him of that charged offense.

This simple rule provides an objective, easily ascertainable protection for the accused and his attorney. They can rely on the substance of the pending charge to delimit the scope of permissible police interrogation outside the presence of counsel and, more importantly, to restrict the uses of any improperly obtained evidence. Fundamentally, of course, this rule simply reaffirms what defense attorneys already know from the Court's precedents: the scope of an accused's Sixth Amendment protection during pretrial interrogation extends only as far as the substance of the charge. *See McNeil*, 501 U.S., at 175-76.

The rule also protects "the other side of the *Miranda* equation: the need for effective law enforcement." *Moran*, 512 U.S., at 461. The police must decide when they may and may not approach an indicted defendant and rely on a waiver of his right to counsel. But when faced with an ongoing investigation into a prospectively undefinable "factual scenario," the police will not be able to foresee what distinct crimes may come to light. After all, the law recognizes that multiple offenses may arise out of the same conduct and be separately prosecuted. *See United States v. Dixon*, 509 U.S. 688, 711-12 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)).

During an investigation the police may decide they have enough evidence to indict a defendant for a discrete offense. At that point, the charged-offense rule would prohibit the police from using any information to convict the defendant of the charged offense if that information was obtained pursuant to, for example, an invalid Sixth Amendment waiver. But the police must be free to continue their investigative efforts as to new or additional crimes—even those that unexpectedly arise out of the same "factual predicates" or "course of conduct" as the charged offense. *Moulton*, 474 U.S., at 179-80 & n.16; *Massiah*, 377 U.S., at 207. The police cannot know where their interrogation of a defendant will lead; of course, if they are questioning an indicted defendant outside the presence of counsel, they *will* know that they will not be able to use that information to bolster their case on the pending charge. The rule, therefore, has a built-in deterrent. But it would be unfair (and, moreover, contrary to *Moulton* and *Massiah*) to prohibit the use of statements that incriminate the defendant as to uncharged offenses for which prosecution has not even begun.

Arguments for some form of a closely-related exception overlook a crucial irony: while the police are not omniscient and cannot predict the ins and outs of a particular factual scenario (indeed, an "investigation" would be unnecessary if they could), the accused most certainly can. The accused ordinarily has a perfect knowledge of whether an offense for which he has already been charged is somehow related by "time, place, or conduct" to an offense the police have not yet uncovered. The accused, in short, knows with certainty whether he killed or raped during the burglary or the robbery. And although the accused does not yet have a Sixth Amendment right to counsel as to these inchoate offenses (because they have not yet been discovered and charged), he does have a Fifth Amendment right not to be compelled to incriminate himself, and has in fact been told so in the *Miranda* warnings. Thus, if the accused becomes

uncomfortable with the direction of an interrogation, he can cut off questioning as to *all* subjects and receive the aid of an attorney by saying four simple words that require no knowledge whatsoever of the intricacies of Fifth and Sixth Amendment law: "I want a lawyer." *See Edwards*, 451 U.S., at 484-85.

Any exception to *McNeil*'s offense-specific rule necessarily creates uncertainty about whether crimes under investigation may be factually "related" and could force prosecutors to defensively and irresponsibly bring charges based on mere suspicion. But this Court has roundly rejected the notion that prosecutors are "constitutionally required" to file charges before their investigations are complete, even if they have already marshaled enough evidence to prove guilt beyond a reasonable doubt. *See Gouveia*, 467 U.S., at 192 n.7; *United States v. Lovasco*, 431 U.S. 782, 791, 792-95 (1977). Instead, the Court has accorded prosecutors broad deference over when and whether to bring formal charges, cognizant that the decision to prosecute is "seldom clear-cut" and demands "a necessarily subjective evaluation of the strength of the circumstantial evidence and the credibility of the [suspect's] denial." *Lovasco*, 431 U.S., at 793. Above all, the Court has declined to badger prosecutors into unripe—and futile—prosecutions that would "make obtaining proof of guilt . . . impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited." *Id.*, at 791. These concerns reach their apex when a prosecutor is faced with a case, like this one, "in which a criminal transaction involves more than one . . . illegal act." *Id.*, at 792-93. The law must give the government a fair opportunity to uncover evidence of crime, without the specter of a potential Sixth Amendment violation brooding over every step of a criminal investigation.

Contrary to some statements, the charged-offense rule does not invite police to "circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional

related crimes." *Arnold*, 106 F.3d, at 41 (quoting *In re Pack*, 616 A.2d, at 1011); *see also McNeil*, 501 U.S., at 187-88 (Stevens, J., dissenting) (warning of the danger of the police "fil[ing] charges selectively in order to preserve opportunities for custodial interrogation"). First, these warnings are not validated by practical reality, and their premises are counterintuitive. If the police want to avoid Sixth Amendment pitfalls, they will simply not file any charges at all until they have completed their investigation, rather than charging selectively and later adding related charges. *Gouveia* and *Lovasco* will protect an officer who holds back on all charges—leaving an officer free from Sixth, but not Fifth, Amendment limitations—but there is little or no strategic advantage to selective charging.

Second, even if the police may deliberately circumvent the charged-offense rule by charging "additional related crimes" (assuming that is even possible or likely), a simple corollary to the rule would foreclose such an attempt. Suppose the police indict a defendant for robbery, subject him to custodial interrogation, and, without securing a valid waiver of his asserted right to counsel, obtain incriminating statements. It should be obvious that the police cannot dismiss the robbery indictment, bring an identical robbery indictment, and then use the illegally obtained evidence to convict the defendant. The rule is offense specific, not indictment specific. But it should be equally obvious that the police cannot then bring a felony murder indictment against the defendant and use the *same* robbery evidence to prove the predicate felony. Using the tainted evidence to convict the defendant of felony murder under those circumstances would be the functional equivalent of convicting him of the previously charged robbery. *See, e.g., Upton*, 853 S.W.2d, at 555-56 (illegally obtained evidence as to charged car theft could not be subsequently used to convict defendant of felony murder predicated on robbery of same car).

Properly understood, the felony murder scenario falls within the charged-offense rule itself. Prosecution for greater- and lesser-included offenses would be, for purposes of the rule, prosecution for the same offense because the two share common elements. In other words, the rule prohibits use of illegally obtained evidence, not only to prove the previously charged offense, but also to prove another offense that includes all the elements of the previous charge—*i.e.*, that is the same offense. This corollary would share the parameters of the well known same-elements test used for double jeopardy purposes. *See, e.g., Dixon*, 509 U.S., at 696; *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The same-elements test, of course, applies in the distinct context of double jeopardy and protects different interests than the Sixth Amendment right to counsel. *See, e.g., Dixon*, 509 U.S., at 696 (same-elements test protects against multiple punishment and multiple prosecution for the same "offence" under Fifth Amendment double jeopardy clause). But application of the test, which looks solely to the elements of a particular offense, is appropriate in the offense-specific Sixth Amendment context, because *McNeil* requires the parameters of the right to counsel to be measured by the particular offense charged. *See McNeil*, 501 U.S., at 175-76.

Third, even assuming that the government may devise nefarious ways to circumvent an accused's right to counsel that are not covered by the rule and its corollary—which emphatically has not happened in this case—the Court has already devised a protective rule to counter such practices. The cornerstone principle in *Massiah*, *Brewer*, and *Moulton* was that the government has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S., at 171. Once a defendant has invoked the Sixth Amendment's protection, the government may not "knowingly exploit" an opportunity to confront an indicted defendant outside counsel's presence, whether by employing

an informant to surreptitiously record conversations with the defendant (*Massiah*; *Moulton*) or by deliberately eliciting responses from a defendant in flagrant breach of an agreement with his attorney not to do so (*Brewer*).

Some courts have found that this knowing-exploitation standard represents an independent check on governmental attempts to circumvent the offense-specific right to counsel. *See, e.g., Whittlesey*, 665 A.2d, at 234-35 (collecting cases); *Hines*, 963 F.2d, at 258; *Martinez*, 972 F.2d, at 1105-06; *Mitcheltree*, 940 F.2d, at 1342. Although this standard is consistent with *Moulton*, *Brewer*, and *Massiah*, it should be noted that allegations of police bad faith have nothing to do with the objective inquiry of whether or not the Sixth Amendment protections have attached to an offense. Evidence that the government has somehow manipulated the order or timing of charges to defeat a defendant's right to counsel should constitute a violation only if the defendant's Sixth Amendment rights have already attached and been invoked. But the extent to which the Sixth Amendment applies to particular offenses cannot expand and contract based on the subjective mental state of the prosecution. *Moulton* makes clear that "the Government's investigative powers are limited by the Sixth Amendment rights of the accused," and not by the good or bad faith of the police or the prosecutor. 474 U.S., at 179-80.

In sum, the Court should not abandon the charged-offense rule derived from its own precedents. Under this rule, once the right to counsel has been invoked, the government may not improperly elicit evidence from a defendant as to a pending charge and then use the evidence at trial to convict the defendant of that charge. Similarly, the police may not use the same evidence to convict the defendant of a subsequent charge that incorporates the previous charge as a lesser-included offense. The government may, however, properly obtain and use evidence relating to a different,

uncharged offense because the Sixth Amendment right to counsel will not have attached to that charge.

3. Cobb's Right to Counsel Had Not Attached to the Murder Charges When He Confessed.

Swearing he knew nothing about the disappearances of Maggie and Kori Rae Owings, Cobb confessed in July 1994 to the burglary of their home and was indicted for that offense. Fifteenth months later and 500 miles away, he was arrested based on new information that he had, in fact, murdered the missing mother and daughter. It is uncontested that Cobb made a knowing, voluntary, and intelligent waiver of his right to counsel and confessed to the murders. Based in part on that confession, he was convicted of capital murder for killing two persons in a single transaction. Pet., at C-1, D-4 ¶13, E-2 ¶3. Cobb was not convicted of capital murder based on the predicate felony of burglary; he was initially indicted for that offense also, but the government abandoned that part of the indictment before trial. Pet., at D-4 ¶¶10, 13.

Cobb's Sixth Amendment right to counsel attached to the burglary offense when he was indicted for burglary. Because the Sixth Amendment is offense specific, however, Cobb's right to counsel did not attach at that time to the distinct offense of capital murder for killing two persons in a single transaction. *McNeil*, 501 U.S., at 175. When Cobb later confessed to the murders, he was not entitled to the heightened protections of the Sixth Amendment and was therefore able to validly waive his right to counsel. Cobb was never tried for the previously charged burglary. Nor was he functionally tried for it, because his murder conviction did not depend on the burglary as a predicate felony. In sum, under a charged-offense test derived from the Court's precedents, Cobb's Sixth Amendment rights were not violated when his incriminating statements were admitted at trial to prove his guilt.

To the extent an independent knowing-exploitation standard may be derived from the Court's cases, it has no application here. Ridley had been appointed as counsel for the burglary, but he testified repeatedly that he did not represent Cobb regarding the disappearances. Pet., at B-2 to B-4, B-10. In fact, Ridley told the police on two occasions that there was no need for his presence if the police wanted to question Cobb about the disappearances. Pet., at B-5 to B-6. According to Ridley, Cobb never objected to the questioning. Pet., at B-6. Finally, even after Cobb had confessed to the murders, Ridley told the police that he did not represent Cobb as to those offenses and that he did not know if he would be appointed. Pet., at B-10. These undisputed facts show that the police behaved with the utmost good faith on all the occasions when they questioned Cobb about the murders, including the occasion that led to his voluntary confession.

The police suspected Cobb all along of having some knowledge about the disappearances. As a result of his confession to the burglary, the police had enough evidence to indict him for that offense, but they had no idea what had happened to Maggie and Kori Rae, under what circumstances they had disappeared, or what the extent of Cobb's knowledge about them was. Cobb made sure of that by burying their bodies and denying any knowledge of his foul acts.

This was the undefined and unknowable factual situation that confronted the police when they received information, through Cobb's father, linking Cobb to the murders. Cobb cannot rationally argue that the police somehow manipulated the laying of the separate burglary and murder charges to circumvent Cobb's right to counsel. They did no such thing. Rather, they independently investigated two distinct offenses

that, as it turned out when Cobb revealed the truth, were linked by common circumstances.

4. Even Under a Principled Application of the Closely-Related Test, Cobb's Right to Counsel Did Not Attach to the Uncharged Murders.

If the Court adopts some formulation of the closely-related test, it should favor the Fifth Circuit's narrow application in *United States v. Cooper* as the version that best balances the competing concerns of law enforcement and the accused. 949 F.2d 737, 742-44 (CA5 1991); *see supra* Part I.B.2. In *Cooper*, state police suspected Cooper in a convenience store holdup. When an inventory search of his car revealed a sawed-off shotgun, Cooper was arrested, arraigned for aggravated robbery, and appointed counsel. Soon after, a federal agent visited Cooper in jail and obtained a waiver of Cooper's right to counsel without notifying his attorney. Cooper was convicted of the state crime of aggravated robbery and was then indicted for the federal crime of unlawful possession of an unregistered firearm. The federal district court denied Cooper's motion to suppress his statements to the federal agent and he was convicted. *Id.*, at 740-41.

Affirming the district court, the Fifth Circuit held that the state armed robbery charge and the federal weapons charge were not the same for Sixth Amendment purposes. The court declined to apply what it termed the extremely-closely-related rule of *Moulton*, reasoning that "[h]ere, the federal and state crimes concern *different conduct*, although, efficiently for the governments, both prosecutions could use much of the same evidence." *Id.*, at 743-44 (emphasis added).

The Fifth Circuit's narrow focus on conduct represents a principled version of the closely-related test. Determining relatedness based on the specific acts that constitute a

criminal offense provides a more objective and a more reliable guide than the open-ended "time, place, and conduct" tests devised by other circuits. *See, e.g., Covarrubias*, 179 F.3d, at 1225. This conduct-based test may also be easily applied, as this case shows. While the burglary and murders occurred during the same general time and place, the acts constituting those offenses were distinct. Specifically, the burglary consisted of Cobb entering the Owings's home with the intent to commit theft. TEX. PENAL CODE §30.02(a)(1); *see Garcia v. State*, 571 S.W.2d 896, 899 (Tex. Crim. App. 1978) (offense of burglary complete upon entering habitation with intent to commit felony or theft). By contrast, the acts constituting the murder offense were entirely separable: Cobb was convicted of capital murder for having murdered Maggie and Kori Rae during a single episode. Pet., at C-1, D-4 ¶13, E-2 ¶3. The fortuity that Cobb committed the murders close on the heels of the burglary does not obscure the fact that the two offenses were separate for Sixth Amendment purposes.

II. ALTERNATIVELY, *MICHIGAN V. JACKSON* DOES NOT BAR COBB'S WAIVER OF HIS RIGHT TO COUNSEL.

Even assuming that Cobb's Sixth Amendment right to counsel attached to the capital murder charge at the time he was indicted for burglary, the Court may resolve this case on the alternative basis that the extraordinary postattachment protections of *Michigan v. Jackson*, 474 U.S. 625 (1986), did not presumptively invalidate Cobb's otherwise valid confession. *See* Pet., at A-6 to A-7.

Jackson must be understood in light of the Sixth Amendment right to counsel it is said to protect. That right to counsel arises, in advance of trial, upon the initiation of "adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *See Kirby*, 406 U.S., at 689. Thereafter, the right protects the criminal defendant at proceedings deemed

"critical stages," one of which is custodial interrogation. *See Brewer*, 430 U.S., at 400-01.

But there is another "right to counsel," arising not from the Sixth Amendment but from the Court's Fifth Amendment jurisprudence. *See McNeil*, 501 U.S., at 176. Upon request, a suspect undergoing custodial interrogation (whether before or after attachment of the Sixth Amendment) has the right to have counsel present, in order to counteract the "inherently compelling pressures" of such interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467-74 (1966).

In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the Court enacted a prophylactic rule to protect the *Miranda* right to counsel. *See also Solem v. Stumes*, 465 U.S. 638, 644-45 & n.4 (1984) (*Edwards* is a "prophylactic rule, designed to implement pre-existing rights"). *Edwards* holds that, once a suspect has invoked his right to counsel during custodial interrogation, he will not be subject to further questioning "until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Id.* An *Edwards* invocation must be a clear and unambiguous request for the assistance of an attorney during custodial interrogation. *Davis v. United States*, 512 U.S. 452, 459-60 (1994).

The *Edwards* bar was "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). If a suspect makes an *Edwards* invocation, the police may not re-initiate questioning until counsel is present. *Minnick*, 498 U.S., at 153. Moreover, an *Edwards* invocation triggers the following *per se* rule: a suspect's subsequent waiver of his right to counsel—even if voluntary, knowing, and intelligent—will be presumed invalid when obtained by police-initiated interrogation outside the presence of counsel. *Edwards*, 451 U.S., at 484; *see, e.g., Arizona v. Roberson*, 486 U.S. 675, 680-81 (1988); *Solem*, 465 U.S., at 646-47.

Five years later, *Michigan v. Jackson* grafted *Edwards* onto the Sixth Amendment. 475 U.S., at 635-36. The Court accorded to a defendant's "assertion" of his right to counsel "*at an arraignment or similar proceeding*," the *Edwards* effect of barring subsequent police-initiated interrogation outside counsel's presence and, significantly, its effect of presumptively barring otherwise valid waivers of a defendant's right to counsel under such circumstances. *Id.* (emphasis added). *Jackson* thus applied the *Edwards* anti-coercion rule outside the immediate context of custodial interrogation.

A. *Jackson* Should Be Overruled Because It Rested on Weak Foundations that Have Been Completely Eroded by Subsequent Decisions of the Court.

Jackson was based on three distinct premises that were either faulty when the case was decided, are untenable today in light of subsequent precedent, or both.

One. The Court reasoned that the anti-coercion principles underlying *Edwards* applied with even more force to custodial interrogation occurring after a suspect has been formally charged: "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." *Jackson*, 475 U.S., at 631-32.

Two. Relying on its precedents concerning waiver of constitutional rights (especially *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), the Court believed it was required "to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Jackson*, 475 U.S., at 632-33. The Court therefore rejected the petitioner's argument that when an accused requests counsel at arraignment, he "may not have

actually intended [his] request to encompass representation during any further questioning by the police." *Id.*[6]

Three. The core of *Jackson* was its wholesale adoption of *Edwards*'s holding, in the Fifth Amendment context, that categorically bars post-invocation waivers of the right to counsel in response to police-initiated questioning. The Court found "no warrant for a different view under a Sixth Amendment analysis," and therefore concluded:

> "Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in the Sixth Amendment analysis." 475 U.S., at 635.

1. From the Beginning, *Jackson* Was Only Tenuously Linked to the Prevention of Coercion in Police-Initiated Custodial Interrogation.

Refuting *Jackson*'s premises begins with then Justice Rehnquist's dissent (joined by Justices Powell and O'Connor), because subsequent decisions of the Court have adopted and reinforced the dissent's fundamental objections to *Jackson*. The dissenting Justices focused on three weaknesses in the majority's analysis.

First, the *Edwards* prophylactic rule was intended to reinforce only the Fifth Amendment's prohibition on

[6] The *Jackson* majority also rejected the state's argument that the police may not know of the defendant's request for counsel at arraignment. 475 U.S., at 634. The Court reasoned that it must "impute the State's knowledge from one state actor to another." *Id.* It is undisputed that the Odessa police were working with the Walker County police when Cobb was arrested for murder. The fact that the Odessa detectives were unaware of Cobb's representation on the burglary charge is irrelevant to the application of *Jackson*, but highly relevant to the officers' good faith in questioning Cobb. *See supra* Part I.B.3.

compelled self-incrimination. 475 U.S., at 638-40 (Rehnquist, J., dissenting). Applying the *Edwards* anti-coercion rule in the Sixth Amendment context, the dissent explained, "cut[s] the *Edwards* rule loose from its analytical moorings." *Id.*, at 640.

Second, application of the new *Jackson* rule "graphically reveal[ed] the illogic of the Court's position." *Id.* The dissent observed that the *Jackson* bar was triggered by an accused's "assertion" of his right to counsel. *Id.* The dissent pointed out, however, that attachment of the Sixth Amendment right to counsel is not tied to any assertion by a defendant. *Id.*, at 641. By contrast, the Fifth Amendment right arises only when invoked: linking a prophylactic rule to a defendant's assertion, as *Edwards* does, thus makes sense in the Fifth Amendment context. *Id.* But applying *Edwards* to the Sixth Amendment, which does not depend on any assertion, left the *Jackson* majority in an "analytical straitjacket." *Id.*

Third, *Jackson* was viewed as an anomalous extension of the Court's waiver jurisprudence. The dissent observed that the Court had previously erected *per se* barriers against certain police conduct. *See id.*, at 641 n.4 (citing *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964)). These were "surreptitious informant" cases, however, in which an accused did not realize he was being questioned by a government agent and therefore had no opportunity to waive his right to counsel. *Id.* It made little sense to extend these precedents to the circumstances of *Jackson*, in which "the conduct of the police was totally open and aboveboard." *Id.*

There was another critical inconsistency in *Jackson* that was not discussed by the dissent. *Jackson*'s second premise was based on a flawed conflation of a defendant's "assertion" and his "waiver" of the right to counsel. *Jackson*, 475 U.S.,

at 632-33 (citing *Zerbst*, 304 U.S., at 464). A defendant's effective or ineffective "assertion" of his right to counsel is in no sense a "waiver" of that right: the two concepts are analytically distinct, and therefore *Zerbst* provides no basis for "broadly" construing a defendant's assertion. *See id.* More concretely, however, this aspect of *Jackson* flatly contradicted the Court's statement two years earlier in *Smith v. Illinois* that "[i]nvocation and waiver [of the right to counsel] are entirely distinct inquiries, and the two must not be blurred by merging them together." 469 U.S. 91, 98 (1984). *Jackson* made precisely that error, and therefore contravened the Court's own precedent.

2. Subsequent Decisions Have Abandoned *Jackson*'s Analytical Framework.

The Court effectively discarded *Jackson*'s first premise a mere two terms later in *Patterson v. Illinois*, 487 U.S. 285 (1988). *Jackson* had reasoned that "the reasons for prohibiting the interrogation of an uncounseled accused are *even stronger* after he has been formally charged with an offense than before." 475 U.S., at 631 (emphasis added). But in deciding that *Miranda* warnings supported waiver of both the Sixth and Fifth Amendment rights to counsel, *Patterson* reasoned:

> "The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose[7] that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning." 487 U.S., at 298-99.

[7] An "important basis" for *Patterson* was counsel's "rather unidimensional role" in postindictment questioning: the Court characterized counsel's role as "largely limited to advising his client as to what questions to answer and which ones to decline to answer." 487 U.S., at 294 n.6.

Patterson relied on a proposition irreconcilably opposed to *Jackson*'s first premise. A clearer repudiation of *Jackson's* first premise is difficult to imagine. Moreover, as Part II.A.3 *infra* shows, whatever marginal benefit *Jackson* provides at arraignment is entirely duplicative of the protections *Edwards* already affords.

Jackson's second premise—conceptually flawed and contrary to *Smith v. Illinois* from the beginning—was further damaged by *Davis v. United States*, 512 U.S. 452 (1994). *Davis* held that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*, at 459. An assertion that "fails to meet the requisite level of clarity" fails to trigger *Edwards*. *Id. Davis strictly* construes a defendant's request for counsel, resolving any ambiguity in favor of the police. *See id.*, at 461 (reasoning that a bright line is needed because "it is police officers who must actually decide whether or not they can question a suspect"). *Jackson*, on the other hand, *liberally* construed the same *Edwards* assertion. 475 U.S., at 633. There is no reason to assume that an *Edwards* assertion need be any less clear in the Sixth Amendment context, and *Davis* therefore directly undermines *Jackson*'s second premise.

Finally, *McNeil v. Wisconsin*, 501 U.S. 171 (1991), was the last nail in *Jackson*'s coffin. *McNeil* held that an accused's invocation of his Sixth Amendment right to counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81. *McNeil* reasoned that defendants invoke their Fifth and Sixth Amendment rights to counsel for distinctly different purposes: (1) the Sixth, to insure postindictment protection

"at critical confrontations with his expert adversary, the government," *id.*, at 177-78; (2) the Fifth, "to protect a quite different interest: a suspect's 'desire to deal with the police only through counsel,'" *id.*, at 178 (quoting *Edwards*, 451 U.S., at 484). Assertion of the Sixth Amendment right (a *Jackson* assertion) was not, as a matter of fact, the assertion of the Fifth Amendment right (an *Edwards* assertion). *Id.* Nor would such a rule be sound policy, because it would effectively render any accused "unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned." *Id.*, at 180-81. The Court rejected that result as destructive of a paramount pubic interest: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.*, at 181.

McNeil obliterated *Jackson*'s third premise by completely severing the *Jackson* rule from any tie to *Edwards*. After *McNeil*, it is clear that a *Jackson* invocation is factually and legally different from an *Edwards* "wish to have counsel present during custodial interrogation." 501 U.S., at 179. But the reasons for *Edwards*—that the police be prevented from badgering a suspect into waiving his already-invoked right to counsel—were the lifeblood of *Jackson*. *See supra* Part II.A (discussing *Jackson*'s third premise); 475 U.S., at 635. *McNeil* leeched every bit of *Edwards* from *Jackson* and effectively transformed the *Jackson* rule into a dead letter.

3. As to Postindictment Interrogatees, *Jackson* Is Entirely Duplicative of the Protections Afforded by *Edwards*.

McNeil clarifies that the *Jackson* rule exists today only as a disembodied presumption, riven from its rational underpinnings in *Edwards*. *See* 501 U.S., at 179 (characterizing a *Jackson* assertion as only a "legally presumed . . . request for the assistance of counsel in custodial interrogation"). Practically speaking, though, eliminating *Jackson* from the

Sixth Amendment canon will have no real effect on an accused's ability to counteract the "inherently compelling" pressures of custodial interrogation targeted by *Miranda*. *See* 384 U.S., at 467.

After *McNeil*, *Davis* and *Jackson* cannot peacefully coexist because *Davis* requires an express invocation that is inconsistent with the practical reality of how a criminal defendant receives appointed counsel. At arraignment, for example, an indigent accused will be appointed an attorney because the Sixth Amendment requires it. *See Gideon*, 372 U.S., at 344-45. This will occur whether the accused requests an attorney or not. *See* TEX. CODE CRIM. PROC. art. 26.04(a) (whenever court determines that defendant is indigent, "the court shall appoint one or more practicing attorneys to defend him"). Appointment is thus automatic and the defendant ordinarily will have no reason to invoke the right to counsel. Should a defendant be "foresighted enough, or just plain lucky enough" to make a further, unnecessary request for counsel, then he will be entitled to the putative benefit of *Jackson* under current law. *See* 475 U.S., at 642 (Rehnquist, J., dissenting).

An accused's subsequent confrontation with police interrogators reveals just how illusory and superfluous the benefit of *Jackson* is. When faced with a postarraignment custodial interrogation, the police must read an accused his *Miranda* warnings, which inform him of his right to counsel. 384 U.S., at 489-70. These warnings, of course, are sufficient to support a waiver of either the Fifth or Sixth Amendment rights to counsel, *Patterson*, 487 U.S., at 296, and the Court has held that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S., at 460. But an accused who wants the help of counsel in dealing with the pressures of interrogation need only say four words, "I want my lawyer," and *Edwards* will shield him from any further police-initiated

questioning and will presumptively nullify any subsequent waiver of the right to counsel—even if the accused meant to waive it. Given this armory of constitutional and prophylactic rights that are activated by an accused's mouthing four simple words, one might ask: what is the purpose of the additional, dubious protection afforded by *Jackson*? The answer: none.

Jackson should be overruled.

B. Alternatively, Cobb Never Made a Sufficiently Clear and Unambiguous Invocation of His Right to Counsel to Trigger *Jackson*.

If *Jackson* retains any precedential force, the Court should not extend it to the facts of this case. The Texas Court of Criminal Appeals held that Cobb had "asserted" his right to counsel "by accepting Ridley's appointment as his counsel." Pet., at A-7. Nothing in the record discloses that Cobb made any further assertion of his right to counsel under *Jackson*. Cobb's mere acceptance of appointed counsel was not a sufficient "invocation" to trigger *Jackson*.

1. A *Jackson* Assertion Should Be at Least as Clear as an *Edwards* Assertion.

Neither attachment of the Sixth Amendment nor actual representation by an attorney invokes the *Jackson* right. *See Patterson*, 487 U.S., at 291-92; *Harvey*, 494 U.S., at 352. Instead, the *Jackson* rule is triggered by a defendant's "assertion," a prerequisite borrowed directly from *Edwards*. *Jackson*, 475 U.S., at 636; *Patterson*, 487 U.S., at 291. Although the Court has not squarely addressed how clear a *Jackson* assertion must be, it has with an *Edwards* assertion.

In *Davis* the Court held that only a clear and unambiguous request for counsel will trigger *Edwards*. *Davis*, 512 U.S., at 459; *see supra* Part II.A.2. By contrast, if a suspect makes an "ambiguous or equivocal" assertion—*i.e.*, one supporting the

reasonable inference only that the suspect "*might* be invoking the right to counsel"—the police are not barred by *Edwards* from further questioning or from obtaining uncoerced waivers. *Davis*, 512 U.S., at 459 (emphasis added). *Edwards* itself supported this rule of clarity by requiring a suspect to have "clearly asserted his right to counsel." 451 U.S., at 485.

Davis strongly invoked "the other side of the *Miranda* equation: the need for effective law enforcement." 512 U.S., at 461. The Court observed that "it is police officers who must actually decide whether or not they can question a suspect." *Id.* Applying *Edwards* only to clear and unambiguous requests for counsel helps the police understand when they may and may not continue questioning and, therefore, protects legitimate efforts to gather evidence of crime. *Id.* A contrary rule would force the police "to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Id.*

This need for clear police guidance is equally strong in the *Jackson* context. A *Jackson* invocation has precisely the same effect as an *Edwards* invocation. *Jackson*, 475 U.S., at 635. Without an unequivocally expressed desire to consult counsel, the police face the same uncertainty when deciding whether to question a postindictment or a preindictment defendant. And, of course, the price of guessing wrong is the same in both contexts: the suppression of an otherwise uncoerced confession. *Id.* The Court has never indicated that there should be a different standard of clarity for *Jackson* as opposed to *Edwards* assertions.[8]

Indeed, a *Jackson* assertion should require *greater* clarity than its *Edwards* counterpart. An *Edwards* assertion is made

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[8] Justice Kennedy has strongly recommended that the Court make consistent its Fifth and Sixth Amendment jurisprudence. *McNeil*, 501 U.S., at 183 (Kennedy, J., concurring).

in the immediate context of custodial interrogation and has a narrowly circumscribed purpose: to cut off questioning and obtain the aid of a lawyer in dealing with custodial interrogation. *McNeil*, 501 U.S., at 178. By contrast, a *Jackson* invocation usually occurs during the relatively open-ended context of, for example, an arraignment or preliminary hearing. A *Jackson* invocation may refer, not only to custodial interrogation, but to any "critical stage" of the prosecution that may follow. *Id.*, at 177-78. Yet *Jackson*, if properly invoked, draws down an iron curtain over all future interrogations with the accused. That far-reaching prohibition should be invoked only by a correspondingly clear and unequivocal assertion.

The Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 259 (CA5 1992), provides an appropriate test for determining a sufficient *Jackson* invocation. The Fifth Circuit ruled that a *Jackson* assertion "connotes an actual, positive statement or affirmation of the right to counsel." *Id.*, at 282. The court explained that "[f]or purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'" *Id.*, at 283 (quoting *Edwards*, 451 U.S., at 484); *see Genry v. State*, 735 So.2d 186, 195-96 (Miss. 1999); *Smith v. State*, 699 So.2d 629, 638-39 (Fla. 1997); *State v. Carter*, 664 So.2d 367, 370 (La. 1995); *People v. Anderson*, 521 N.W.2d 538, 543-44 (Mich. 1994); *Skaggs v. Parker*, 27 F.Supp.2d 952, 977 (W.D. Ky. 1998) (all adopting *Montoya*).

Montoya's rule comports with the holding in *Davis* that an *Edwards* assertion must be clear and unambiguous. The Court should measure Cobb's mere acceptance of appointed counsel against the requirement that a *Jackson* invocation must "connote[] an actual, positive statement or affirmation of the right to counsel." *Montoya*, 955 F.2d, at 282.

2. Cobb's Mere Acceptance of Appointed Counsel Was Not an Assertion at All, Much Less an Assertion Sufficient To Trigger the Heightened Protections of *Jackson*.

Merely accepting appointed counsel should not qualify as an "assertion" at all. The Court has strongly indicated that both *Edwards* and *Jackson* will be triggered only by a defendant's affirmative, clear, and unambiguous statement of his desire for counsel. *See, e.g., Davis*, 512 U.S., at 461 (*Edwards* "must be affirmatively invoked by the suspect"); *McNeil*, 501 U.S., at 175 (*Jackson* operates once the "right to counsel has attached and has been invoked"); *Patterson*, 487 U.S., at 291 (*Jackson* turned on the fact that the accused "had asked for the help of a lawyer"); *Jackson*, 475 U.S., at 636 (both *Edwards* and *Jackson* grounded on the defendant's "assertion of the right to counsel"); *Edwards*, 451 U.S., at 485 (barring reinterrogation if suspect "has clearly asserted the right to counsel"). Indeed, if something other than a defendant's statement may trigger the prophylactic bar, then *Davis* was entirely unnecessary. The record here is devoid of any statement by Cobb asserting his desire for counsel's assistance. The Court of Criminal Appeals therefore erred in applying *Jackson*.

Even if a defendant's behavior in accepting counsel may be regarded as "assertive," it is not the kind of clear and unambiguous assertion that triggers *Jackson* and *Edwards*. Hypothetically, of course, an accused who accepts counsel may be breathing a sigh of relief that he now has counsel to shield him from the vast machinery of the prosecutor. Conversely, an accused who has "accepted" counsel may well regard that counsel as completely unnecessary in one important instance: where the accused plans to confess his crime, whether from remorse or from a desire to obtain favorable treatment in a plea bargain. But even if it is *likely* that an accused who accepts counsel believes that he will thenceforth be shielded from any sort of police questioning,

this Court has clearly stated that "the likelihood that a suspect would wish counsel to be present is not the test for the applicability of *Edwards*." *McNeil*, 501 U.S., at 178. Nor should it be for *Jackson*.

Mere acceptance of counsel falls far short of the clarity demanded by *Davis*, and consequently by *Jackson*. If *Jackson* requires anything less than the "clear assertion" demanded by *Edwards*, then *Jackson* has no meaning in the Sixth Amendment context. Because counsel must be appointed to every indigent accused, the attachment of the Sixth Amendment itself will invariably activate the harsh *Jackson* prohibitions. That rule would be "a thinly disguised constitutional policy of minimizing or entirely prohibiting the use of evidence of voluntary out-of-court admissions and confessions made by the accused." *Massiah*, 377 U.S., at 209 (White, J., dissenting). But the law should "rejoice at an honest confession." *Minnick*, 498 U.S., at 167 (Scalia, J., dissenting). The Sixth Amendment should not be read to invalidate a confession by a defendant who has never declared an intention to deal with the police only through counsel and who has voluntarily waived the right to counsel before confessing. The paternalistic rule of law that would prevent that laudable act "imprison[s] a man in his privileges and call[s] it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

An accused subject to postindictment questioning may enjoy the ample protections of *Jackson* by a simple, clear, and unequivocal request for the assistance of counsel in dealing with police interrogation. Linking *Jackson*'s pervasive rule to an accused's mere acceptance of appointed counsel, however, will unfairly cripple the police's legitimate efforts to obtain uncoerced confessions. Because Cobb merely accepted appointed counsel when arraigned for burglary, *Jackson* did not bar his subsequent confession to murder.

3. Cobb Failed to Invoke *Jackson* and Demonstrated that He Did Not Wish the Aid of an Attorney in Dealing with the Police.

The undisputed record in this case shows that neither Cobb nor his attorney, Ridley, ever objected to the police questioning Cobb outside Ridley's presence about the disappearances of Maggie and Kori Rae Owings. In fact, Ridley's uncontradicted testimony at the suppression hearing was that he "cut off any more contact [Cobb] had with law enforcement" only on November 14, 1995, two days after Cobb had already confessed to the murders. Pet., at B-11. Even assuming that Ridley could have "asserted" Cobb's right to counsel for him,[9] he did so only after Cobb had already confessed. Pet., at B-11.

It was undisputed that Ridley represented Cobb in connection with the burglary charge, beginning in August of 1994, and that the Walker County investigators knew this. Pet., at B-1 to B-4. The Court of Criminal Appeals placed great weight on the fact of Cobb's actual representation by Ridley and on the fact that, on two occasions before Cobb confessed to the murders, Walker County investigators had asked Ridley's "permission" to speak to Cobb about the disappearances. Pet., at A-4 to A-5, A-7. Yet the court ignored Ridley's responses to those police requests. Ridley acknowledged in his testimony that he consistently indicated to the police (1) that there was no reason for him to be present

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[9] It is far from clear that an attorney can assert the Sixth or Fifth Amendment rights to counsel on his client's behalf. *See, e.g., Moran*, 475 U.S., at 433 n.4 (noting the "elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled"); *United States v. Muick*, 167 F.3d 1162, 1165-66 (CA7 1999) (interpreting *Moran* as "holding that only the accused may invoke the *Miranda* right to counsel"). The Court need not resolve that question in this case.

when they questioned Cobb about the disappearances, (2) that, if Cobb himself did not object to the questioning, Ridley also had no objection to it, and (3) that Ridley did not even represent Cobb with respect to any possible criminal investigation that arose out of the disappearances. *See* Pet., at B-3, B-5 to B-6, B-10 to B-11.[10] The undisputed facts thus confirm that Cobb's Sixth Amendment right to counsel was never violated or even in danger of being violated.

Of course, Cobb's actual, on-going representation by Ridley could not have triggered *Jackson*. That would flatly contradict the Court's statement that "nothing in the Sixth Amendment prevents a suspect charged with a crime *and represented by counsel* from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Harvey*, 494 U.S., at 352 (emphasis added). Indeed, the formation of the attorney-client relationship cannot trigger attachment of the Sixth Amendment itself, much less the heightened, prophylactic protections of *Jackson*. *See Moran*, 475 U.S., at 430 ("[T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purpose of the right to counsel.").[11] Thus, Cobb's actual

[10] Ridley tried to qualify his permission by testifying that he gave it "believing [Cobb] wasn't a suspect." Pet., at B-6. At the same time, however, Ridley admitted that the police "always said they thought [Cobb] knew more than he was saying." Pet., at B-7. Ridley never explained what difference, if any, exists between the police suspecting Cobb of "knowing more than he was saying" about the disappearances and considering him a "suspect" in the disappearances. Importantly, however, Ridley was never misled by the police regarding their suspicions of Cobb's involvement in the disappearances, and Ridley himself declined to testify that he had been misled. *See* Pet., at B-6.

[11] These principles illustrate why the Ninth Circuit's recent decision in *United States v. Harrison*, 213 F.3d 1206 (CA9 2000), is in error. *Harrison* holds that a defendant may anticipatorily invoke his Sixth Amendment right to counsel by obtaining counsel on an on-going basis, with the government's knowledge, as to the eventual offenses for which he is charged. *Id.*, at 1213. *Harrison* not only violates the Court's clear statements in *Harvey* and *Moran*, it also contradicts the Court's statement in *McNeil* that the Sixth Amendment "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." 501 U.S., at 175. It should be elementary that the Sixth Amendment prophylaxis in *Jackson* cannot be "invoked" until the Sixth Amendment itself attaches. *See, e.g., Muick*, 167 F.3d, at 1165 ("*McNeil* forecloses the argument that the Sixth Amendment right to counsel may be invoked before indictment.").

representation by Ridley, both as a matter of the facts here and as a matter of law, did not "wrap a protective cloak around" him, nor did it "protect [Cobb] from the consequences of his own candor." *Id.*

C. Alternatively, the Fifteen-Month Break in Custody Between Cobb's Burglary Arraignment and His Murder Confession Lifted the *Jackson* Bar.

The Court may resolve this case on the alternative basis that Cobb's lengthy break in custody between August 1994 and November 1995 dissolved the *Jackson* bar. The courts of appeals have addressed this issue as to *Edwards*, but not *Jackson*. The circuit courts agree that a break in custody that is reasonably sufficient to allow a defendant to seek the advice of counsel eliminates the need for the *Edwards* rule. *See United States v. Arrington*, 215 F.3d 855, 856-57 (CA8 2000) (citing *Holman v. Kemna*, 212 F.3d 413, 419 (CA8 2000)); *Kyger v. Carlton*, 146 F.3d 374, 380-81 (CA6 1998); *United States v. Bautista*, 145 F.2d 1140, 1150 (CA10 1998); *United States v. Barlow*, 41 F.3d 935, 945-46 (CA5 1994); *United States v. Hines*, 963 F.2d 255, 256-57 (CA9 1992) (citing *United States v. Skinner*, 667 F.2d 1306, 1309 (CA9 1982)); *Dunkins v. Thigpen*, 854 F.2d 394, 397 (CA11 1988); *McFadden v. Garraghty*, 820 F.2d 654, 661 (CA4 1987); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125

& n.6 (CA7 1987), *overruled on other grounds by McNeil*, 501 U.S., at 177-82. The courts are unanimous on this issue. *See Kyger*, 146 F.3d, at 380. This Court itself has indicated in *dictum* that *Edwards* applies only "assuming there has been no break in custody." *McNeil*, 501 U.S., at 177; *see Bautista*, 145 F.3d, at 1150 (relying on *dictum* in *McNeil*).

The reasons for the break-in-custody exception to *Edwards* apply equally to *Jackson*. A break in custody dissolves the *Edwards* effect because "if custody is broken, especially for a lengthy period of time, the inherently coercive nature of custody itself is diminished and there is little to no risk of badgering by the authorities." *Bautista*, 145 F.3d, at 1150; *see also Kyger*, 146 F.3d, at 381 (*Edwards*'s concern with police coercion "simply is not implicated when a suspect is not in continuous custody"). *Jackson*, of course, bars police-initiated questioning in precisely the same setting as *Edwards*—custodial interrogation—and shares *Edwards*'s concern for preventing badgering of defendants who have previously invoked their right to counsel. *See Jackson*, 475 U.S., at 635. In short, the break in custody exception unanimously adopted by eight circuits should apply with equal force to *Jackson*.

Even assuming that Cobb sufficiently invoked *Jackson* by accepting appointed counsel at his burglary arraignment, Cobb was released on bond after the August 1994 arraignment and was not taken into police custody again until November 1995. During this fifteen-month break in custody, Cobb was free to consult with his appointed counsel. Pet., at B-5. This lengthy period should have been sufficient to lift any *Jackson* bar lowered at Cobb's arraignment. Thus, when the Odessa police arrested Cobb in November 1995, Cobb was not prevented by *Jackson* from unilaterally making a valid waiver of his right to counsel and confessing.

CONCLUSION

The Court should reverse the decision of the Texas Court of Criminal Appeals.

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APPENDIX

APPENDIX

STATE DISTRICT COURT
WALKER COUNTY, TEXAS
12TH DISTRICT

Criminal Case No. 18,920

THE STATE OF TEXAS

v.

RAYMOND LEVI COBB

DOCKET ENTRIES

DATE	PROCEEDINGS
1/4/96	Record; Appearances - D. Weeks, Defendant (Δ), H. Ridley, B. Green; Hearing: Arraignment-waived reading of indictment, plea of not guilty; Δ found indigent-appointed H. Ridley lead counsel, B. Green co-counsel (1st Chair & 2nd Chair)
12/18/96, 10:00 a.m. 6:20 p.m.	Record; Appeared-D. Weeks, J. Gaines, Defendant, H. Ridley, B. Green; Pretrial hearing: Δ's motion to suppress and motion to suppress Defendant's statement pursuant to *Jackson v. Denno*: pursuant to Δ's motion, per *Gannett Co., Inc., Petitioner, et al., v. De Pasquale, etc., et al.*, 99 S.Ct. 2898 (1979) and *Richmond Newspapers, Inc., etc., et al., Appellants*

DATE	PROCEEDINGS
	et al., v. Commonwealth of Virginia, et al., 100 S.Ct. 2814 (1980), Court closed hearing on this motion to public including media and issued verbal gag order re: any at this hearing divulging contents of hearing; recessed after 3 witnesses/3 hours, balance of time involving other cases.
12/19/96, 9:45 a.m. 6:00 p.m.	Record; same appearances; resumed hearing, evidence (at 9:55); evidence concluded at 4:30 p.m.; argument; motions denied; abeyed until trial ruling re knives removed from house of Δ by his father; findings/conclusions will be prepared.
	Outside jury's presence; rule of witnesses invoked; jury seated, sworn, instructed (with 2 alternatives); state presented indictment-Section 19.03 Capital Murder-Defendant's plea not guilty; opening statement by State; State's evidence began at 9:55 a.m.; recessed at 5:20 p.m.
2/24/97, 9:10 a.m. 5:15 p.m.	Record; same appearances; resumed trial; State's evidence; State rested at 11:15 a.m.; recessed re jury; Defendant's motion for instructed verdict denied.
2/25/97, 9:00 a.m. 5:15 p.m.	Record; same appearances; resumed trial; Defense rested; Court presented charge to jury; final arguments; jury retired to deliberate re verdict at 10:10

DATE	PROCEEDINGS
	a.m.; at 11:15 a.m., jury returned verdict-Guilty, Capital Murder; jury presiding Juror Phillip Townsend; jury polled-unanimous verdict; verdict received, accepted.
2/26/97 1:00 p.m. 5:20 p.m.	Record; same appearances; punishment phase of trial began.
2/27/97	At 2:10 p.m., jury returned verdict: Special Issue 1 answered "Yes", Special Issue 2 answered "No," jury polled-unanimous verdict; verdict received, accepted; jury instructed and released; Court pronounced death sentence; Court advised Defendant of post trial and appellate rights; Judgment rendered, entered, signed.
10/28/97	Signed Findings of Fact and Conclusions of Law. William L. McAdams; by DB.

TEXAS COURT OF CRIMINAL APPEALS

Criminal Case No. 72,807

THE STATE OF TEXAS,
Petitioner,

v.

RAYMOND LEVI COBB,
Respondent.

DOCKET ENTRIES

DATE	PROCEEDINGS
6/23/1999	Case submitted
3/15/2000	Opinion issued (reversed and remanded).
4/4/2000	Motion for Stay of Mandate granted; 90-day extension from issuance of opinion.
5/1/2000	Petition for writ of certiorari to United States Supreme Court (filed 4/21/2000).
6/9/2000	Mandate stayed by United States Supreme Court (motion filed in USSC on 6/2/2000).
7/3/2000	Petition for writ of certiorari granted (limited to questions 1 & 2).

Supreme Court, U.S.
FILED
SEP 29 2000
CLERK

No. 99-1702

In The

Supreme Court of the United States

THE STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

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CAPITAL CASE
QUESTIONS PRESENTED

I.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony question?

II.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986) and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

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I. RESPONDENT'S INTRODUCTORY STATEMENT

Petitioner frames its arguments within its brief in the reverse of the Questions for Review as submitted in the Original Petition for Writ of Certiorari. Respondent also believes the Second Question as originally submitted is the crucial question for this Honorable Court to consider in this case, thus Respondent addresses the Questions for Review in the reverse order in this brief as well. In addition to the arguments made in the Petitioner's brief, five separate *Amicus Curiae* briefs have been filed in support of the Petitioner. Respondent will, therefore, include commentary on the theories propounded in these Amicus Curiae briefs.

Both Questions for Review in this case involve the Sixth Amendment right to assistance of counsel. Respondent will occasionally refer to the right of an accused to have the guidance and assistance of legal counsel, as guaranteed by the Sixth Amendment, as the *"attorney-client relationship"*. The term is meant to be all inclusive of the duties and responsibilities required of counsel in the guidance of a defendant through the adversarial process.

Also, in the briefs of Petitioner and *Amicus Curiae*, a suggestion is made that Respondent's pretrial attorney implied his consent and therefore waived any complaint with regard to law enforcement's interrogation of Respondent because counsel had granted permission for law enforcement to talk to Respondent on two prior occasions, when they had assured the attorney the Respondent was not a suspect. There is also a contention that the statement made by the attorney during his pretrial suppression testimony, that he was not Respondent's

counsel for the "capital murder charge" constitutes an admission that Respondent's right to counsel had not attached, even though this passing statement is clearly taken out of context. Finally, there are arguments implying that the admission of the confession taken from Respondent was harmless error in this case.

The Texas Court of Criminal Appeals rejected these arguments based upon the state trial court findings of fact and independent state law grounds. Therefore, Respondent submits that none of these collateral arguments should be considered by this Court. These issues were not submitted to the Court in any of the Questions for Review and these interpretations of the facts are not implicated in the Court's granting of certiorari on the two Questions for Review. It is well-settled that the state court's fact-findings must be given great deference by this Court, as the Court's jurisdiction normally applies only to determination of questions of federal law. *See* SUP. CT. R. 10 (revised May, 1999); *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963); *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). Consequently, Respondent will not directly speak to these arguments, unless, of course, the Court requests an additional briefing on these matters.

II.

SUMMARY OF ARGUMENT

With regard to Question No. 1, Respondent submits that:

1. The arguments of Petitioner and the *Amicus Curiae*, if adopted, would permit law enforcement to freely and arbitrarily violate a defendant's Sixth Amendment right to counsel under circumstances where the state

already knows, or clearly should know, that an *attorney-client relationship* exists.

2. The *"inextricably intertwined"* or *"closely related"* offense exception, as derived by the lower courts from *Brewer v. Williams*, 430 U.S. 387 (1977), and *Maine v. Moulton*, 474 U.S. 159 (1985), should be formally adopted by this Court in order to comport with Sixth Amendment protections. Under the facts in this case, as interpreted by Texas law, the burglary offense, for which Respondent was represented by counsel, was clearly covered under this related offense exception.

3. While Petitioner implies that the prior Sixth Amendment decisions of this Court are "unworkable" and "confusing" to law enforcement and the courts, Respondent will show that lower courts have been interpreting these rules for years without substantial difficulty or confusion.

4. Petitioner concedes that some *"related crime"* test should be adopted and proposes that said test be based on the elements of the offense. Respondent submits that a simple and workable fact-based test should be adopted by this Court, rather than the complicated test proposed by Petitioner.

With regard to Question No. 2, Respondent submits that:

1. The decisions of this Court dealing with the Sixth Amendment right to assistance of counsel are easily reconciled based upon their factual circumstances, thus negating the need for abandonment of *stare decisis*.

2. The Petitioner's desire that the Court overrule *Michigan v. Jackson*, 475 U.S. 625 (1986), is unnecessary generally, and clearly unnecessary under the facts in this case.

III.

ARGUMENT AND AUTHORITIES

QUESTION NO. 1

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony?

A. Summary of Supreme Court Right to Counsel Decisions

Over the years, this Court has found that the interpretations of the protections of the Fifth and Sixth Amendments, where a criminal defendant has *invoked his right to counsel*, are controlled by the factual distinctions as to when the right to counsel is invoked, i.e., before or after the defendant is formally charged and whether the interrogations involve "related" or "separate and different" offenses. A brief review is in order.

- In *Brewer v. Williams*, 430 U.S. 387 (1977), the Court concluded there was a Sixth Amendment violation when the police continued to interrogate the defendant, who had counsel on a kidnapping charge, and the interrogation led to the confession of a murder that arose out of the kidnapping offense for which the defendant had been arrested.
- In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court concluded that the Fifth Amendment does not protect a defendant from further interrogation on completely

separate crimes when counsel had been requested on a previous offense, but before counsel was obtained.

- In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court concluded that a Fifth Amendment violation occurred when the defendant was arrested for multiple offenses (burglary, robbery, and murder) and requested counsel, but, before an attorney-client relationship was formulated, interrogations took place without any showing that the defendant "voluntarily waived" his right to counsel.
- In *Maine v. Moulton*, 474 U.S. 159 (1985), the Court concluded that a Sixth Amendment violation occurred when law enforcement officers continued to investigate and "bugged" the defendant with the use of an informant, in an attempt to collect evidence of other crimes when the defendant was already charged with a factually related offense and represented by counsel.
- In *Michigan v. Jackson*, 475 U.S. 625 (1986), another case interpreting the Sixth Amendment, the defendant requested counsel during his arraignment. Before he had an opportunity to consult with counsel, however, he was questioned by officers about the primary offense. This Court concluded that, because the Sixth Amendment attached at the time of the arraignment, further interrogation was improper.
- In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court again interpreted the Fifth Amendment and found that a violation occurred when a defendant, after he requested counsel with regard to one specific offense, but before he had opportunity to consult with that counsel, was interrogated by another officer about a completely separate offense. The Court specifically noted in ruling the confession inadmissible that, even though separate offenses were involved in the interrogations, there was no distinction under the Fifth

Amendment once the defendant requested the assistance of counsel.

- In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court addressed a pre-indictment situation where the defendant was interrogated by the FBI about federal offenses and requested counsel, but was thereafter interrogated by state officials about a separate crime in Mississippi which the defendant confessed to without the presence or knowledge of counsel. Because the defendant had not been indicted on any offense, the Court utilized the Fifth Amendment protections and held that the request for counsel to the federal officers prevented the state officers from interrogating the defendant without counsel. The confession was inadmissible.

- In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court concluded that a Sixth Amendment violation occurred where a defendant, who had counsel, was interrogated without notifying his counsel and consequently made incriminating statements. The Court held that such statements could be used for impeachment only but, since the state had not used the confession during their case in chief, upheld the conviction.

Thus, as of the decision in *Harvey*, the decisions of the Court appeared to be relatively consistent with regard to the application of the Fifth and Sixth Amendment principles for many years. In the 1991 case of *McNeil v. Wisconsin*, 501 U.S. 171, however, the Court addressed the question that had been brought before the Wisconsin Supreme Court:

> Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his Fifth Amendment right to counsel that precludes police interrogation on *unrelated*, uncharged offenses? *Id.* at 175. (emphasis supplied)

In *McNeil*, the defendant obtained counsel after being formally charged with robbery. He was subsequently interrogated by law enforcement officers from another jurisdiction about completely separate crimes, to which the defendant confessed without invoking his right to counsel on those charges. The Court ruled the confession admissible because the defendant waived his right to counsel under the Fifth Amendment. The Court further stated that the Sixth Amendment right to counsel did not attach to the separate and distinct charges because the Sixth Amendment is "offense-specific" and does not attach until adversarial proceedings commence.

In reviewing this Court's decisions involving the right to counsel protections of the Fifth and Sixth Amendments, it is appropriate to conclude that:

1. Under the Fifth Amendment, once the right to counsel is invoked by a defendant on a criminal offense prior to a formal charge being initiated, the defendant is protected from interrogation on the primary offense, as well as any other separate and distinct offenses. This is true even if they are unrelated to the primary charge for which the defendant requested counsel, unless the defendant initiates contact with law enforcement. See *Arizona v. Roberson*; *Minnick v. Mississippi*; cf. *Michigan v. Mosley*, 423 U.S. 96 (1975).

2. Under the Sixth Amendment, once the right to counsel is invoked, it is impermissible for law enforcement to invade the attorney-client relationship after counsel is secured for a particular offense where law

enforcement is seeking to obtain information related to that specific offense. See *Massiah v. United States*, 377 U.S. 201 (1964); *Spano v. New York*, 360 U.S. 315 (1959); *United States v. Henry*, 447 U.S. 244 (1980). This does not include, however, a situation with the use of *passive* informers. See *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

3. The "offense-specific" limitation on the Sixth Amendment of *McNeil* is applicable only to situations where the defendant, after he has invoked his right to counsel, is interrogated regarding offenses that are clearly separate and distinct from the charged offense, perhaps even from a separate jurisdiction. This does not constitute a conflict with the holdings of *Michigan v. Jackson*, *Michigan v. Harvey*, *Brewer* or *Moulton*. Nothing in *McNeil* directly overrules those previous decisions. Consequently, *Brewer* and its progeny do not constitute exceptions to *McNeil*. To the contrary, *Brewer* is a starting point for any Sixth Amendment analysis.

B. The Protection of the Right to Counsel is Crucial

Respondent submits that it would be disastrous to the protections of the Sixth Amendment if this Court acquiesces to Petitioner's attempts to validate law enforcement efforts to interrogate a citizen, with an existing and on-going attorney-client relationship, about possible offenses that are closely related, inextricably intertwined, or otherwise implicated in the same criminal transaction for which the citizen is charged. Such acquiescence would permit law enforcement officers almost complete and total license to conduct unwanted and

uncounseled interrogations of a defendant about matters that are clearly covered under the *reasonable scope* of the Sixth Amendment's guarantee of a citizen's right to effective assistance of counsel.

Reference to case law is not necessary to grasp the reality that, when an attorney-client relationship is formed in a criminal matter, whether by court appointment of counsel or otherwise, the attorney must inquire into and investigate all the facts of the criminal transaction for which his client was arrested, regardless of the offense charged, in that there may be a number of interrelated offenses. The attorney must recognize all potential criminal liability arising from the transaction, not just the charge for which the client was arrested. It is always possible that new charges may be brought against the client, as the state is free to continue its investigation. This is especially true when the potential charges stem from the same criminal transaction. It is not realistic to expect a different attorney be appointed or hired for each possible offense. Thus, the criminal defense system must recognize that a *competent* attorney should be allowed to investigate all related crimes for trial preparation and even utilize them if he is seeking a plea bargain that will minimize potential criminal liability to his client.

As a matter of law, an attorney's responsibility to his client must include the consideration of the impact of any closely related crimes, lesser included offenses and all offenses that arose out of the same criminal transaction. If the attorney does not make such a full investigation, he would clearly be guilty of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Cronic v. United States*, 466 U.S. 648 (1984); *Powell v. Alabama*,

287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Yet according to Petitioner, the requirement of competency by the attorney must bow to the state's interest in being able to investigate crime. Under well-recognized constitutional principles, the protection of the Sixth Amendment guarantee cannot be held inferior to the government's right to investigate crime. *See Michigan v. Jackson*. The protections of the Sixth Amendment simply must take precedence. *See Massiah; United States v. Henry; Michigan v. Harvey*.

How is the attorney to maintain and protect the integrity of the attorney-client relationship when law enforcement can continually interrogate the client without the knowledge or presence of counsel on each and every potential offense arising out the same transaction? Because no formal charges on these related offenses are involved, the defendant cannot demand appointed counsel. The client would therefore be forced to constantly defend himself personally against persistent attempts by law enforcement to interrogate him on such related offenses, even though the interrogation involves conduct for which his right to counsel has attached. The indigent, uneducated, illiterate, youthful, or possibly retarded defendant would be at the mercy of law enforcement's continuous efforts to circumvent his rights. In the context of preservation of the Sixth Amendment guarantee of effective assistance of counsel, it does not make sense to allow such repeated invasions.

Although this Court has continuously made clear, the *"Bright-Line"* decisions that prevent such interference

with the attorney-client relationship would be rendered useless if this Court fails to recognize that the attorney's sworn duties clearly include representation of the defendant on all related offenses, especially prior to those related offenses becoming formal charges. *See generally Arizona v. Roberson; Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Edwards v. Arizona*.

Petitioner's argument simply fails to consider the accused's right to have counsel who must adequately investigate all potential criminal liabilities. The acceptance of Petitioner's argument would result in an unacceptable situation where an attorney has discovered other possible criminal liability tied to the charged offense, but he cannot do anything about it, other than allow his client to be continuously interrogated without his knowledge, on numerous potential crimes related to the offense for which he must defend the client.

C. The Related Crimes Concept as Derived from *Brewer, Moulton,* and *McNeil*

Petitioner concedes, throughout its briefs and in the Question presented to this Court, that the burglary charge, for which Respondent had invoked his right to counsel and maintained an ongoing attorney-client relationship, was clearly a *"factually-related"* offense to the capital murder charge on which Respondent was convicted. Petitioner further effectively concedes that some *"related offense"* test should be formulated by this Court and suggests that said test be an element-based test similar to that of *United States v. Blockburger*, 284 U.S. 299

(1932). Respondent submits that the concessions of the Petitioner and the *Amicus Curiae*, that some related offense test should be devised, undermines Petitioner's arguments that the Sixth Amendment should not provide any protections to the Respondent or any other criminal defendant similarly situated.

It is suggested throughout the briefs of Petitioner and the *Amicus* that the decision in *Moulton* was ill-considered. They imply that Court never properly recognized the distinction of interrogations involving crimes that had not been formally charged at the time the attorney-client relationship was violated. The Solicitor General raised the exact same arguments in *Moulton* that he raises in the instant case before the Court. As this Court noted in Footnote 15 in *Moulton*:

> In his brief, the Solicitor General assumes that the only claim made by the Government and answered by the Court in Massiah was that the Government was engaged in a continuing investigation of crimes as to which charges were already pending. Brief for United States as Amicus Curiae, 23-24. So saying, he asks us to distinguish from that justification the justification that law enforcement officials are investigating "separate" crimes. . . . The Court in Massiah was thus faced with the very same argument made by the Solicitor General in this case. Even were the Solicitor General's characterization of the issue posed in Massiah correct, however, we would not draw the distinction he asks us to make. The likelihood of post hoc rationalizing is the same whether police claim to be investigating other examples of the same crime or some allegedly "separate" crime. We

> take what we feel is a more realistic view of police investigations, and instead accept that dual purposes may exist whenever police have more than one reason to investigate someone." 474 U.S. 159, 179-80, n. 15.

Thus it is clear that, ever since *Massiah* in 1964, the Solicitor General has been making the same arguments made here, claiming that because "charges are not pending" at the time the attorney-client relationship is violated, the constitutional protections should not apply. This Court has previously rejected those claims and should do so here as well.

Petitioner claims that "[t]he Court's precedents support no exception to the general rule that the Sixth Amendment attaches only to the charged offense," and that "[n]either *Moulton* nor *Brewer* supports an exception to *McNeil*." Brief for Petitioner at 15. Respondent would respectfully show, contrary to Petitioner's claims, these very cases cited demonstrate that this Court's precedents clearly do support such an exception.

As noted previously in the summarization of cases in this brief, *Brewer* dealt with an arrest for kidnapping and a murder prosecution arising out of that abduction, where the defendant had not been charged with murder when the Sixth Amendment violation occurred. In *Moulton*, the defendant had been charged with theft, but had not yet been charged with burglary when the Sixth Amendment violation occurred. The theft offense was *"inextricably intertwined"* or *"closely related"* to the burglary offense because the vehicles and/or parts that were stolen were taken during the burglaries. *See Maine v.*

Moulton, 481 A.2d 155, 162-63 (Me. 1984). The same factual applications are present in the case before the Court. Respondent was charged with burglary and ultimately prosecuted for capital murder arising out of that burglary. The burglary charge is "inextricably intertwined" or "closely related" to the capital murder charge.

In *McNeil*, this Court did not modify or overrule either *Brewer* or *Moulton*, even though it clearly had the opportunity to do so. *Id.* at n.15. The terms *"offense-specific"* and *"charge at issue"* appear to be the only references by the Court in *McNeil* as to the extent of the Sixth Amendment limitations in this context.

As noted, the Sixth Amendment's guarantee of effective assistance of counsel mandate that an attorney investigate and advise a criminal client about all potential liabilities which could expose the client to additional charges arising out of the same transaction for which the attorney has been engaged. A reasonable interpretation of the terms *"offense-specific"* or *"charge at issue"* in this context must include crimes, even though separately defined under the Penal Code, that: (1) are part of the same criminal transaction or criminal episode; or (2) have common elements that could be prosecuted by the state under a number of different penal code provisions; or (3) constitute lesser included offenses; or (4) are directly related or intertwined by the conduct, intent, or culpability of the actor; or, perhaps, (5) where under the law of that jurisdiction, these "related crimes", even though not formally charged, come within the ambit of responsibility and duty owed by counsel to be investigated on behalf of his client.

Texas law allows all crimes occurring as part of a criminal episode to be prosecuted in a single criminal proceeding Sections 3.01-3.02, Texas Penal Code. In addition, the Texas Court of Criminal Appeals permits any such offenses arising out of a criminal episode to be prosecuted in one criminal proceeding. *See Rios v. State*, 846 S.W.2d 310 (Tex. Crim. App. 1992). As the Texas courts have adopted the test of *Strickland v. Washington*, to be equivalent to the Texas Constitutional requirements of "effective assistance of counsel", *see Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1986) and *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999), it is obvious that an attorney in Texas has the constitutional *duty* to provide legal assistance to a client with regard to all offenses arising out of a criminal episode in this State.

In this case, the crime of "burglary" had the same elements of both the original burglary charge under Section 30.02, Texas Penal Code and the predicate offense of the second count of the capital murder indictment under Section 19.03(a)(2) of the Texas Penal Code. The burglary and the capital murder charges arose out of the same criminal episode and criminal transaction as defined under Chapter 3 of the Penal Code. The burglary and capital murder occurred at the exact same time, at the same place, in the same judicial venue, and involved the same victims and law enforcement entity.

In *United States v. Arnold*, 106 F.3d 37 (3rd Cir. 1997), the Court of Appeals justified the related offense exception to the offense-specific rule in *McNeil*, stating that:

> [t]he reasoning underlying this exception is consistent with the purposes and protections of the Sixth Amendment. When the pending charge is

> 'so inextricably intertwined' with the charge under investigation, 'the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense.' . . . '[T]o hold otherwise would allow the [government] to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes' after questioning him without counsel present. *Id.* at 40-41 (citations omitted).

Besides the capital murder count for which Respondent was convicted (murder of more than one person in the same criminal transaction, Section 19.03(a)(7)(A)), Texas Penal Code. Respondent alternatively could have been charged and prosecuted for a number of capital murder charges. For example, under Section 19.03(a)(2) of the Texas Penal Code, Respondent could have been charged with murder intentionally committed in the course of committing kidnapping, burglary, or robbery. Under Section 19.03(a)(8) of the Texas Penal Code, Respondent could have been charged with capital murder for the murder of an individual under six years of age. Nine separate capital murder charges were possible in this case. In addition to the capital murder charges, there were certainly dozens of other charges, including misdemeanors, felonies, lesser included offenses, criminal attempts, etc., that could have been charged against Respondent as part of this "criminal episode".

Respondent strenuously contends that attorney Ridley had a responsibility, under both Federal and Texas law, to investigate, prepare, advise, and consult with Respondent about all of these potential charges as an integral part of his representation. Obviously, Ridley did

not have to accept appointment for Respondent in any eventual trial proceedings, but Ridley's *legal duty* to Respondent on this burglary case clearly did extend to all related charges arising out of the actions committed by the Respondent during that Texas criminal episode. Ridley attempted to provide those services, but the State, by not notifying Ridley upon obtaining the arrest warrant for Respondent in November, 1995, clearly thwarted Ridley's ability to properly represent Respondent in a constitutionally meaningful way.

Petitioner argues that, because Respondent was not "convicted" of the capital murder count with the predicate offense of burglary, the previous custodial interrogation without benefit of counsel should not fall under the umbrella of Sixth Amendment protections. That argument is an attempt to "close the barn door after the horse has gotten away". Bearing in mind that the decision as to what offense to charge lies strictly within the discretion of the government, the fact that Respondent was not subsequently convicted of the burglary-predicate offense capital murder is constitutionally *irrelevant* to the issue presented to this Court.

It should be of no moment that the State's pursuit of one of many charges at trial had any bearing upon the prior invasion of his Sixth Amendment rights. That is equivalent to saying that because an illegal search turned up evidence of criminality, the search should be retroactively justified. Such a concept has been rejected by this Court for decades. *See Mapp v. Ohio*, 367 U.S. 643 (1961). Once a constitutional violation is shown, the government should not be able to benefit from the illegally obtained evidence at any future criminal proceeding. *See Wong Sun*

v. United States, 371 U.S. 471 (1963). The State did benefit here, since the confession admitted to the jury included details of the burglary, the charge for which Respondent was represented by counsel at the time of the violation.

D. There was No Waiver of the Right to Counsel

Even though the primary law enforcement agency in this case (Walker County) brought in another agency (Odessa Police), there was no confusion by Walker County law enforcement as to Respondent's legal representation and such knowledge must also be imputed to the actions of the Odessa police officers. *See Michigan v. Jackson; Arizona v. Roberson; Minnick v. Mississippi.* It is an undisputed fact that the Walker County officials believed Respondent to be their best suspect, certainly as of September, 1995, on possible crimes arising out of the burglary. *See* Trial Court Findings, Petitioner's Appendix to certiorari petition, D-5, Finding No. 17.

This Court has made it clear that once a defendant invokes his right to counsel, as Respondent did here, under either the Fifth or Sixth Amendment, it is not a waiver of that right to counsel if the defendant gives incriminating statements upon interrogation by the state, even with *Miranda* warnings, when the defendant has not been allowed to consult with his attorney. *See Edwards v. Arizona; Arizona v. Roberson; Minnick v. Mississippi; Michigan v. Harvey; Estelle v. Smith*, 451 U.S. 454 (1981). None of these cases are challenged by Petitioner in this case. *See also Carnley v. Cochran*, 369 U.S. 506 (1962); *Johnson v. Zerbst*, 304 U.S. 458 (1932); *Brewer v. Williams; Miranda v.*

Arizona; Escobedo v. Illinois; Faretta v. California, 422 U.S. 806 (1975).

Petitioner also contends that *Patterson v. Illinois*, 487 U.S. 285 (1988), is an authority for finding a subsequent waiver of counsel at the 1995 custodial interrogation. Respondent submits that *Patterson* can easily be distinguished on the basis that, initially, there was no indication in *Patterson* that the defendant ever requested counsel for anything, even after he was advised of his rights to counsel. *Patterson* does not involve a situation where the attorney-client relationship already existed, as occurred in the instant case. Further, the majority opinion in *Patterson* cited with approval the holding in *Michigan v. Jackson*.

Respondent submits that, because there was an invocation of the right to counsel and a fully formed attorney-client relationship had been firmly established in this case, *Patterson* was decided based on completely different factual considerations than the case at hand and is not appropriate authority.

Petitioner additionally cites *Davis v. United States*, 512 U.S. 452 (1994), for the proposition that, because this Court has mandated a defendant's request for counsel must be *unequivocal*, a defendant's Sixth Amendment protections have been somehow diluted. However, this case is not one involving a "mere assertion" for counsel, but is a case in which Respondent not only requested counsel, but obtained counsel during a judicial proceeding. The prohibited interrogations occurred during an attorney-client relationship which had existed for a substantial period of time and was known to the authorities

involved. Likewise, any reliance upon *Moran v. Burbine*, 475 U.S. 412 (1986), is unwarranted since at no time in *Moran* did the defendant ever personally invoke his right to counsel under either the Fifth or Sixth Amendment interpretations. The record in the instant case will not support any finding that the 17 year old Respondent waived his already perfected right to counsel when interrogated by the Odessa police.

E. The Law Enforcement Bad Faith Exception

This Court has made it clear that Due Process and the Sixth Amendment right to counsel protect citizens against law enforcement that intentionally, or in bad faith, attempt to surreptitiously invade the attorney-client relationship. *See Massiah v. United States; Michigan v. Harvey; United States v. Henry; Spano v. New York*. The findings of the state courts here make it clear that all Walker County law enforcement agents involved knew that Respondent was a suspect in the disappearance and possible death of these victims, as well as the fact that Hal Ridley had been the Respondent's attorney for almost a year and a half. Throughout the period of Ridley's representation, the Walker County law enforcement agents had suspicions that the burglary had instigated the entire criminal transaction and requested Ridley's permission to speak to Respondent on two separate occasions. However, Walker County officials chose not to inform the Odessa Police that Respondent had counsel, nor inform Respondent's counsel of the arrest warrant and interrogation. This came as some surprise to the Odessa police, as was reflected in their testimony.

During the pretrial suppression hearings on this confession, the State offered no excuse, justification, or rationale for its failure to contact Ridley or inform the Odessa police that Respondent was represented by counsel. Not one of the State's witnesses offered any testimony or evidence as to why they did not contact counsel during the entire time that they were discussing probable cause with the Odessa police, preparing and obtaining an arrest warrant for Respondent, transmitting that warrant to Odessa, etc. Attorney Ridley was not even contacted after Respondent was returned to Walker County, when law enforcement officers took Respondent on a lengthy videotaped search for the bodies of the victims. It was not until several hours after all of the interrogations that Ridley was notified of Respondent's arrest and confession.

The trial court findings support the conclusion, in fact, that Ridley had been misled by the officers for a period of time. The Walker County officials indicated to Ridley that Respondent was not a suspect until only a few weeks before his arrest. *See* State of Texas Petition for Certiorari, Appendix D-5, Trial Court Findings No. 15-17. As this Court stated in *Moulton:*

> [the] knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. 474 U.S. 159, 176, (1985).

Absent any evidence to show justification for not notifying counsel, Respondent submits that this record clearly supports the logical conclusion that the invasion

of the attorney-client relationship was intentional and knowing on behalf of the Petitioner's agents, in violation of constitutional principles.

F. The Double Jeopardy Elements Test is Inappropriate

In the *Amicus Curiae* brief of the Solicitor General of the United States, it is argued that this Court should apply a Fifth Amendment Double Jeopardy analysis under *United States v. Blockburger*, 284 U.S. 299 (1932), to determine which offenses are "related" under the Sixth Amendment protection, citing *Dixon v. United States*, 509 U.S. 688 (1993). As noted, this argument concedes that the formulation of some reasonable test for utilizing a "related offenses" test is required. However, this argument also presumes that what happens later, at trial, is dispositive of what previously occurred at the time law enforcement officials invaded the attorney-client relationship. Ultimately, this argument simply ignores the fact that the State has the absolute discretion to decide what offenses to charge.

Respondent submits that the arguments of Petitioner and *Amicus* are astonishing. They are suggesting that law enforcement agencies across the country, in their efforts to investigate criminal offenses, should be cognizant of the complex and intricate holdings of this Court with regard to what constitutes Double Jeopardy under the Fifth Amendment. As an initial reaction, Respondent notes that *Dixon* overruled *Grady v. Corbin*, 495 U.S. 508 (1990), a case that was barely three years old at the time. *Grady* obviously caused great confusion in the Court as to

the application of the Double Jeopardy doctrine to a wide variety of pleadings and charges which could be instituted against a criminal defendant. *See Grady*, (concurring and dissenting opinions). Further, both *Grady* and *Dixon* involved criminal contempt cases, not the general variety of penal code offenses involving statutory elements.

It does not seem appropriate to allow the State the option of violating a defendant's right to counsel and then later bring the defendant to trial on related, but albeit statutorily different, offenses for the purposes of covering up the constitutional violation. In the instant case, as previously shown, numerous related but statutorily distinct crimes could have been alleged by the state in the subsequent indictment.

Respondent recalls this Court's words in *Ashe v. Swenson*, 397 U.S. 436, 444 (1970), when it was recognized that the state has the ultimate discretion as to what offenses to charge and there are a vast number of "hypertechnical and archaic" pleadings that can be utilized by a prosecutor to charge various offenses, which should require a factual analysis, rather than some technical statutory elements analysis. *See also Green v. United States*, 355 U.S 184 (1957); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Brown v. Ohio*, 432 U.S. 161 (1977).

This Court specifically held in *Dixon* that, if an offense was a lesser included offense, even the *Blockburger* test would suffice to bar prosecution. Respondent submits that, under Texas law, the Texas Court of Criminal Appeals has consistently allowed juries to be instructed on lesser included offenses, even in capital cases, where included in the primary charge are some

elements of other crimes under the Texas Penal Code, even though such offenses are not statutorily considered to be lesser included by the Penal Code. *See Broussard v. State*, 642 S.W.2d 171 (Tex. Crim. App. 1982); *Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1975); *Chanslor v. State*, 697 S.W.2d 393 (Tex. Crim. App. 1985); *Bartholomew v. State*, 871 S.W.2d 210 (Tex. Crim. App. 1994); *Bignall v. State*, 887 U.S. 21 (Tex. Crim. App. 1994); *Jones v. State*, 984 S.W.2d 254 (Tex. Crim. App. 1998); *Arevalo v. State*, 963 S.W.2d 887 (1997), on remand, 970 S.W.2d 547 (1998); *Homan v. State*, ___ S.W.2d ___ (Tex. Crim. App., No. 578-99, May 31, 2000).

Consequently, under the Petitioner's *Blockburger* test argument, if utilized, the offense of burglary is a common law lesser included offense of one of the capital murder counts in this indictment, even though that indictment count was subsequently dismissed. Once again, it is respectfully submitted that the State should not be able to benefit by engaging in constitutionally prohibited conduct through the utilization of its subsequent discretion with the pleadings.

Respondent submits that, should the Court consider adopting some form of the Double Jeopardy test, there is uncertainty as to how the Dual Sovereignty doctrine would be applied. Under the Dual Sovereignty doctrine, federal and state prosecutions may occur based on the same exact conduct. *See Bartkus v. Illinois*, 359 U.S. 121 (1959). Since it is obvious that the United States Congress has federally criminalized most street crimes which the states were originally responsible for, it is now almost impossible not to be able to pursue a federal prosecution

for most felonies contemporaneous with the state's prosecution. In the instant case, the FBI could have been called in to investigate the disappearance of the victims under the Federal kidnapping statute. 18 U.S.C. § 1201. Theoretically, in this case, once Petitioner had invoked his right to counsel to the state homicide charge when he was arrested in November, 1995, under the Petitioner's urging of the Double Jeopardy concept, the Dual Sovereignty exception could be invoked, allowing the FBI to question the Respondent, even though the state authorities were barred. Of course, such action would conflict with the rules holding that the invocation of the right to counsel applies to all law enforcement agencies, both federal and state alike. *See Minnick v. Mississippi; Westover v. United States*, 384 U.S. 436 (1966).

Finally, the Double Jeopardy provision has also incorporated other doctrines barring jeopardy, including the "multiple punishment" prohibition, *see North Carolina v. Pearce*, 395 U.S. 171 (1969), and the collateral estoppel doctrine of *Ashe v. Swenson*. It is unclear how these doctrines will be integrated into the suggestions by Petitioner and the *Amicus Curiae* that the Fifth Amendment Double Jeopardy rules should be applied retroactively to the Sixth Amendment violation committed here. Under Texas law, the requirements of Chapter 3 of the Texas Penal Code allow single trials that consolidate all crimes out of the same criminal episode, thus potentially satisfying the multiple punishment prohibition of *Pearce*. The decision in *Ashe* requires a particular factual analysis of the evidence, not merely a review of statutory elements, as does *Blockburger*.

As Respondent understands the arguments of Petitioner, a small town deputy sheriff or police officer is supposed to analyze and properly apply the complicated concepts of Double Jeopardy before determining when he can interrogate a possible suspect that he knows has counsel for a factually related, but statutorily different, offense. Respondent cannot begin to imagine the ultimate confusion of law enforcement that will occur in their attempts to interpret the application of the Double Jeopardy doctrine that was discussed in *United States v. Dixon*. Respondent submits that the use of this test would also cause substantial confusion of application by the lower courts in this country.

Respondent thinks that it would be far simpler to require that law enforcement officers have some basic knowledge of the offenses within their individual jurisdictions (as they must admittedly have to be certified officers) and then assume that the officers will reasonably understand which factually related offenses arise out of a single criminal episode, as a routine investigation will uncover. In the vast majority of cases, officers can easily determine whether the interrogation might invade the attorney-client relationship built upon an offense factually related to those being investigated. Because the formulation of a rule for application must be applied nationally, it is reasonable to conclude that any test this Court devises must have flexibility to apply in all jurisdictions and under the particular laws of each state.

The test submitted by the Petitioner is simply a sham argument meant to convince this Court to "open the doors", allowing law enforcement to violate Sixth Amendment protections. Because of the vagaries of the

different statutory processes in the various states, it is submitted that Respondent's suggestions make much more practical and constitutional sense. Respondent asks this Court to reject this unworkable and confusing *Blockburger* elements test.

G. There is a Lack of Confusion in the Lower Courts

Petitioner claims that the decisions in *Moulton* and *Brewer* have caused confusion in the lower courts and with law enforcement agencies as to how a related offenses exception should be applied. Respondent would simply show that *Moulton* and *Brewer* have been in existence for decades, and that the lower court decisions applying the related offenses exception appear to be relatively uniform and consistent. There is certainly no showing that there is any substantial confusion among law enforcement agents. As noted prior, the application of a *Blockburger* element based test would in fact cause substantial confusion.

In support of Respondent's contentions that the United States Courts of Appeals seem to be relatively uniform in their application of a *related offenses* exception, Respondent would set out the following leading authorities from each Court of Appeals that have discussed the issue:

First Circuit: United States v. Nocella, 849 F.2d 33 (1988); *United States v. Bender*, ___ F.3d ___ (No. 99-2190, August 4, 2000).

Second Circuit: *United States v. Mapp*, 170 F.3d 328 (1999); *United States v. Ming He*, 94 F.3d 782 (1996).

Third Circuit: *United States v. Arnold*, 106 F.3d 37 (1997).

Fourth Circuit: *United States v. Kidd*, 12 F.3d 30 (1993); *United States v. Melgar*, 139 F.3d 1005 (1998).

Fifth Circuit: *United States v. Carpenter*, 963 F.2d 736 (1992); *United States v. Cooper*, 949 F.2d 737 (1991).

Sixth Circuit: *United States v. Doherty*, 126 F.3d 769 (1997).

Seventh Circuit: *United States v. McKinley*, 84 F.3d 904 (1996).

Eighth Circuit: *Hellum v. Warden*, 28 F.3d 903 (1994).

Ninth Circuit: *Hendricks v. Vasquez*, 974 F.2d 1099 (1992); *United States v. Covarrubias*, 179 F.3d 1219 (1999); *United States v. Martinez*, 972 F.2d 1100 (1992).

Tenth Circuit: *United States v. Micheltree*, 940 F.2d 1329 (1991).

Eleventh Circuit: *United States v. Terzado-Madruga*, 897 F.2d 1099 (1990).

District of Columbia Circuit: *United States v. Watson*, 894 F.2d 1345 (1990) (error not perfected for review).

Respondent would also note that the cases considered by the individual states are similarly consistent. *See People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988); *State v. Tucker*, 645 A.2d 111, 120-25 (N.J. 1994), *cert. denied*, 115 S.Ct. 751 (1995); *In re Pack*, 616 A.2d 1006, 1008-11 (Pa. 1992); *Whittlesey v. State*, 665 A.2d 223 (Md. 1995), *cert. denied*, 116 S.Ct. 1021 (1996); *Commonwealth v. Rainwater*, 681 N.E.2d 1218 (1997); *Taylor v. State*, 726 So.2d 841 (1st C.A. 1999). *See also Wesbrook v. State*, ___ S.W.3d ___ (Tex. Crim. App. September 20, 2000). The national jurisprudence thus demonstrates no substantial confusion concerning application of the Sixth Amendment principles previously announced by this Court.

H. Independent State Grounds for Affirming the Texas Court of Criminal Appeals

Respondent contends that it is vital for this Court to understand that, due to the particularities of Texas law, the Federal Questions presented here should be analyzed more closely, especially when attempting to craft a rule that applies to different state jurisdictions. As noted previously, Texas joinder requirements permit all crimes occurring during one criminal episode to be tried together in a single proceeding and Texas case law permits a predicate offense in a capital murder charge to be a lesser included offense, allowing the jury to acquit on the homicide and convict on the predicate offense. Other provisions of Texas law should also be mentioned here which may have ramifications on this Court's consideration of this case.

In *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), for example, this Court stated that *"adversary judicial criminal proceedings"* may commence *"by way of formal charge, preliminary hearing, indictment, information, or arraignment."* In Texas, the arraignment proceeding has nothing whatsoever to do with securing counsel. *See* TEX. CODE CRIM. PROC. ANN. art. 26.02. Under Texas law, any criminal

defendant arrested, either with or without warrant, must be taken immediately to a magistrate for the purposes of being advised of his right to counsel and requesting court appointed counsel, if indigent. *See* TEX. CODE CRIM. PROC. ANN. art. 14.06 & 15.07. A defendant may only be formally charged in Texas by an indictment from a Grand Jury, unless the Grand Jury proceeding is waived and the indictment can only be waived if the defendant is represented by "legal counsel". *See* TEX. CODE CRIM. PROC. ANN. art. 1.141. Respondent submits that the Texas right to counsel, under the specific statutes and Article I, Section 10 of the Texas Constitution, attaches at an earlier point in time in the criminal process than is generally recognized. *See also* TEX. CODE CRIM. PROC. ANN. art. 1.051.

If the Highest State Court determines that a set of offenses must be treated as *"inextricably intertwined"* or *"closely related"* under its particular law and practice so as to require application of the *"related offenses"* rule, this should be considered as having been determined on an *Independent State Law* basis. In the instant case, the Texas Court of Criminal Appeals found that the burglary and capital murder offenses were so "related" and that the right to counsel attached to these related crimes. While Respondent recognizes that the Texas Court of Criminal Appeals espoused a Sixth Amendment analysis, it is also true that said result was required under the court's interpretation of Texas law. Respondent believes that there are considerations presented here which may prevent this Court from reversing the decision of the Texas Court of Criminal Appeals, inasmuch as the decision below was based on an independent state analysis of state law and procedure. *See also Holloway v. State*, 780 S.W.2d 787 (Tex.

Crim. App. 1989); *Upton v. State*, 853 S.W.2d 548 (Tex. Crim. App. 1993); *Wesbrook v. State*.

I. Other Considerations

Respondent herein does not seek to extend the decisions of *Moulton* or *Michigan v. Jackson*, or any other precedents, past the instant stated factual presentation. Respondent does not propose, for example, that law enforcement be barred from legitimately taking action by using informants or police officers to investigate *ongoing* or *future crimes*.

Any time law enforcement determines that there are plans being made by a defendant, even if represented by counsel, to engage in *present or future criminal activity*, Respondent concedes that appropriate law enforcement action may be permitted, regardless of whether such actions could be considered invasive of the established right of counsel. *See United States v. Terzado-Madruga*, 897 F.2d 1099 (1990); *Kuhlmann v. Wilson*; *cf. Arizona v. Fulminante*.

Under the Sixth Amendment, the planning and/or commission of present or future crimes would not be protected by attorney-client privilege and therefore no Sixth Amendment protection for those crimes would be necessarily available. *See Nix v. Whiteside*, 475 U.S. 157 (1986) (*The privilege generally does not extend to confidences concerning present and future criminal activity. Id.* at 166-67.); *see also* TEX. R. CRIM. EVID. 503(d)(1); TEX. DISCIPLINARY R. PROF. COND. 1.05(c)(7) & (8); *United States v. Moschiano*, 695 F.2d 236, 240-43 (7th Cir. 1982), *cert. denied*, 464 U.S. 831 (1983). In this case, no such present or future

crimes were involved. After almost two years from the burglary, law enforcement did not perceive that there was any ongoing continuing crimes.

Because it is inconceivable that the circumstances of the instant case would *not* fall under the related offense exception under Texas law, Respondent submits that his rights to the protection of counsel were improperly violated and that evidence was secured and utilized in violation of Respondent's Sixth Amendment rights. The decision of the Texas Court of Criminal Appeals should be upheld in order to protect the Sixth Amendment right to assistance of counsel in this country.

IV.

ARGUMENT AND AUTHORITIES

QUESTION NO. 2

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

A. Introduction

Petitioner seeks to radically change the law as stated in *Maine v. Moulton*, 474 U.S. 159 (1985), and *Brewer v. Williams*, 430 U.S. 387 (1977), and requests this Court to directly overrule *Michigan v. Jackson*, 475 U.S. 625 (1986). Such action is completely unnecessary.

The decision in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), confined to its facts, wherein there were separate offenses from different jurisdictions, committed on different dates, is clearly distinguishable from those other authorities. There has been little confusion in the lower courts about the application of *Moulton* and *Brewer*. In fact, the decisions of the federal and state courts show remarkable insight in support of Respondent's position, as previously noted in this brief. It is respectfully submitted that the existence of an attorney-client relationship formulated in this case, lasting over one and a half years, clearly distinguishes this case from Petitioner's claims that there was a "mere assertion" of the right to counsel.

B. Petitioner's Request to Overrule *Michigan v. Jackson* is Unnecessary

In requesting that *Jackson* be overruled, Petitioner claims that since *McNeil* is more recent, the previous decisions protecting Sixth Amendment rights should be limited. Petitioner also argues that the language in this Court's prior decisions was ill-conceived and too broad. To the contrary, Respondent respectfully submits that all the Court's decisions, even *McNeil*, can be easily reconciled upon factual differences.

In *McNeil* this Court did not modify or even attempt to overrule the decision in *Michigan v. Jackson*, as Petitioner now requests. In fact, this Court stated that:

> [o]ur holding in *Michigan v. Jackson*, 475 U.S. 625 (1986), does not, as petitioner asserts, contradict the foregoing distinction; to the contrary, it rests on it. . . . [T]he relevant question was not

> whether the *Miranda* Fifth Amendment right had been asserted, but whether the Sixth Amendment right to counsel had been waived. *Id.* at 179.

This does not sound like a repudiation of *Jackson*. In *Michigan v. Harvey*, 494 U.S. 344 (1990), cited with approval in *McNeil*, it was recognized that the prior holding in *Michigan v. Jackson:*

> created a bright-line rule for deciding whether an accused who has 'asserted' his Sixth Amendment right to counsel has subsequently waived that right. Transposing the reasoning of *Edwards v. Arizona*, 451 U.S. 477 (1981), which had announced the identical 'prophylactic rule' in the Fifth Amendment context, *see Solem v. Stumes*, 465 U.S. 638, 644 (1984), we decided that after the defendant requests assistance of counsel, any waiver of the Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and the evidence obtained pursuant to such a waiver is inadmissible. *Id.* at 349.

As previously noted in this brief, there was no waiver of counsel shown under the facts of this case. The confession in this case was obtained from Respondent after he was arrested and placed into custody in November, 1995. The statements made included Respondent's admission to the burglary for which he was represented by counsel. In *McNeil*, at 176, this Court indicated that *"statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses,"* acknowledging the prior ruling in *Moulton*. Respondent suggests that *"other crimes, as to which the Sixth Amendment right has not yet attached"*

is limited to crimes that are not closely related, inextricably intertwined, or clearly implicated in the same criminal transaction for which the defendant was originally charged.

In the case before the Court, the confession utilized by the State included references to the burglary for which Respondent was represented by counsel. Therefore, the suggestion that some statements may be inadmissible and others may not, depending upon the particular offense to which they refer, may not be applied here since the jury heard Respondent's admissions to the burglary in a confession that violated the Respondent's right to counsel. The "closely related" or "inextricably intertwined" nature of this criminal episode simply cannot be constitutionally segregated or limited by the language of *McNeil*.

The Majority Opinion in *McNeil* feared that:

> [i]f we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned. *Id.* at 181.

This language reflects the fact that the Court did not consider the offenses involved as having any relationship, because if the Court had considered them to be the same offense, or related, where defendant had counsel, further interrogation without notification to counsel would have been barred. *See Edwards v. Arizona*, 451 U.S. 477 (1981). In addition, it cannot be said that Respondent *"never expressed any unwillingness to be questioned"*, since he had earlier requested and received appointment of counsel. Therefore, *McNeil* is again distinguished. Justice

Kennedy's concurring opinion in *McNeil* lends support to this realization, when it is noted that:

> [l]imiting the extraordinary protections of *Edwards* to a particular investigation would not increase the risk of confessions induced by official efforts to wear down the will of a suspect. (concurring opinion at 183).

In the case before the Court, there was only one *particular investigation* involved. This particular investigation clearly included the multitude of possible offenses occurring in concert with the burglary offense in December, 1993. Respondent submits that his right of counsel, even if limited to this particular investigation, was in fact, violated under the related offense (*particular investigation*) doctrine.

Any attempt to overrule *Michigan v. Jackson* would require this Court to engage in a wholesale re-analysis and modification of all its precedents over the last quarter of a century, impacting judicial and law enforcement practices and procedures that are well-settled. As there is no conflict in these cases, Respondent submits that *McNeil*, *Moulton*, and *Brewer* are all reconcilable, and there is no need to overrule any prior decisions.

C. *Stare Decisis* Considerations

Petitioner and the *Amicus Curiae* seek to have this Court overrule and reject prior decisions, almost in a manner that seems frivolous. Perhaps this is because Petitioner originally submitted to this Court an additional Question for Review which presumed this Court would

overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in *Dickerson v. United States*, 530 U.S. ___ (No. 99-5525, June 26, 2000). Respondent will not re-analyze the Chief Justice's remarks in *Dickerson*, but would note that the Court made it clear that the principle of *stare decisis* was crucial to maintaining consistency in the criminal justice system. The Court even acknowledged the continuing viability of *Arizona v. Roberson*, 486 U.S. 675 (1988). This Court's decision in *Brewer*, which Respondent submits is almost exactly on point to this case with regard to the facts, has been the law of this country for almost twenty-five years and is well-engrained into judicial and law enforcement practices. Although Petitioner does not seek apparently to directly overrule *Brewer*, this is the import of the theory propounded.

As Respondent has attempted to show, this is simply not a case which necessitates changes in the law. Respondent respectfully submits that it only takes a reasonable interpretation of existing case law and a recognition of the realities of the Sixth Amendment right to counsel provisions, which are meant to ensure the protection of citizens who have invoked their right to counsel and are relying on counsel to protect them from the forces of government.

Respondent recognizes that this Court has indicated, from time to time, that the Fifth Amendment seems to provide "more broad" protection than does the Sixth Amendment. *See Michigan v. Mosley*, 423 U.S. 96 (1975); *McNeil v. Wisconsin*. Respondent would respectfully urge the Court to reconsider this analysis, because he strenuously believes that the Sixth Amendment right to assistance of counsel may be the most single important

protection of all available to citizens in the context of the Criminal Justice System.

Once a defendant's right to counsel attaches to an incident occurring on a particular date and time and in a particular jurisdiction, it is reasonable, logical, and constitutionally appropriate to hold that the right to counsel should not be limited, even if there is only a single formal charge. The government is not limited in continuing its investigation and has the discretion to add, subtract, modify and actively pursue further formal charges arising out of the criminal episode.

If, therefore, the right to counsel is to mean anything, Sixth Amendment protections on related offenses should not be limited. In order to afford the defendant effective assistance of counsel, and since the defendant's counsel has a responsibility to investigate and advise defendant on those offenses which are related, the government must not be permitted to invade the *Constitutional Shield* that is the right to counsel, when it can do so by merely claiming to be investigating new crimes that have not yet been successfully presented to a Grand Jury.

For all the above-mentioned reasons, Respondent would respectfully pray that the Petitioner's requested relief on this Question be denied.

V.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore, premises considered, Respondent asks that this Court affirm the decision of the Texas Court of

Criminal Appeals, or, in the alternative, dismiss this action as improvidently granted.

Respectfully submitted,

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(15)

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IN THE

Supreme Court of the United States

TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ of Certiorari to the Texas Court of Criminal Appeals

PETITIONER'S REPLY BRIEF

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ARGUMENT

This case presents two different visions of the Sixth Amendment right to counsel. According to Cobb, the Sixth Amendment forbids police from questioning an accused outside his lawyer's presence not only about offenses charged in an indictment, but also about all other offenses that occurred at the same time as the charged offense.[1] By contrast, Texas believes that the Sixth Amendment only reaches offenses for which a defendant has been formally accused "by way of formal charge, preliminary hearing, indictment, information, or arraignment," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), and that a defendant must rely on Fifth Amendment guarantees to shield him from questioning about other offenses—including those arising from the same transaction as the charged offense.[2] Unlike Cobb's position, Texas's position is supported by the text and purposes of the Sixth Amendment, and by this Court's jurisprudence.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL PROTECTS AN ACCUSED ONLY AS TO A CHARGED OFFENSE.

Cobb and his *amici* contend that the Sixth Amendment right to counsel has more than one trigger. They accept the familiar rule that an indictment activates the right to counsel as to the offenses charged. But, going further, they argue that formation of the attorney-client relationship also triggers the Sixth Amendment as to offenses—as yet uncharged—that arise from the same transaction as a charged offense. *See, e.g.*, Defense amici, at 12-18. They unjustifiably warn that, without this additional rule, attorneys will be unable to defend their clients, because the police will exploit unfettered access

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[1] *See, e.g.*, Respondent's Brief, at 11-14; Brief of Amici Curiae the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association (Defense amici), at 12-20.

[2] *See, e.g.*, Petitioner's Brief, at 20-30.

to uncounseled defendants and will wring confessions from them at will. *See, e.g.*, Defense amici, at 14-15. Nothing could be further from the truth. Bringing charges against an individual invokes a variety of constitutional protections. But charging a defendant with one crime while the police continue to investigate another factually related but uncharged crime does not deny the defendant the guidance of counsel nor otherwise put him at a disadvantage. If anything, it disadvantages the police by ensuring that a previously unrepresented defendant will have the benefit of counsel, not only for the charged offense which the Sixth Amendment protects, but also as a practical matter for the uncharged offense. In any event, Cobb's view of Sixth Amendment attachment was rejected by the Court over a decade ago. *See Moran v. Burbine*, 475 U.S. 412, 429-30 (1986).

A. The Court Has Consistently Interpreted the Right to Counsel as Extending Only to Charged Offenses.

The Sixth Amendment reserves its cluster of rights only for "criminal prosecutions."[3] The text refers to a distinct procedural event, *i.e.*, to "an action or proceeding instituted in a proper court on behalf of the public, for the purpose of securing the conviction and punishment of one accused of crime." BLACK'S LAW DICTIONARY 374 (6th ed. 1990). That language, combined with the amendment's references to the "accused" and the "accusation," confirms that Sixth

[3] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

Amendment rights are "accusation-based." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 102-03, 139 (1997). Its promises accrue only when the government "accuses" by initiating a "criminal prosecution." *Id.*, at 102-03.

The Court has reinforced this reading by consistently holding that the Sixth Amendment right to counsel is triggered only by "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S., at 689; *see McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (quoting *Kirby*). This rule is "far from a mere formalism" because "it is only then that the government has *committed* itself to prosecute, and only then that the adverse positions of the government and defendant have *solidified*." *Kirby*, 406 U.S., at 689-90 (emphasis added). Indeed, this line of demarcation is "*fundamental* to the proper application of the Sixth Amendment right to counsel." *Moran*, 475 U.S., at 431 (emphasis added). Consequently, "[w]hen the suspect is not yet 'accused' in the constitutional sense, the sixth amendment bestows no protection whatsoever." H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1156 (1987).[4]

Thus, only when the criminal prosecution reaches a certain procedural stage—one where the positions of government and defendant have "solidified"—do Sixth Amendment rights begin to flower. *Kirby*, 406 U.S., at 690. The Court's use of the words "solidified" and "committed" implies that there are investigatory phases leading up to a prosecution to which the

[4] *See also id.*, at 1164 ("[T]he offer of the sixth amendment remains dormant until the actual commencement of legal proceedings against [a defendant]. By its terms, and by consistent judicial reading, the constitutional guarantee of counsel accrues only to the charged defendant.").

Sixth Amendment does not apply. *See, e.g., Moran*, 475 U.S., at 429-30. To be sure, *other* constitutional guarantees may come into play. For instance, if a suspect is arrested and interrogated, he is entitled to an array of procedural safeguards arising from the Fifth Amendment ban on self-incrimination. *See, e.g., Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). And, of course, a pre-indictment suspect may hire an attorney and be advised how to deal with the police in the event he is questioned. But the *constitutional* right to counsel does not arise until the government formalizes its intent to prosecute.

Against this backdrop, *McNeil* articulated what was already implicit in the Court's jurisprudence—that the Sixth Amendment right to counsel, and its prophylactic counterpart, are "offense specific." 501 U.S., at 175; *see Michigan v. Jackson*, 475 U.S. 625, 636 (1986). That is, their protection is only as broad as the formal criminal proceedings that give them life. *See* Petitioner's Brief, at 11, 21. Thus, a charged offense would be covered by the Sixth Amendment, while an uncharged offense—even a "new or additional crime" committed by the defendant under indictment—would not. *See Maine v. Moulton*, 474 U.S. 159, 180 & n.16 (1985).

B. The Breadth of the Attorney-Client Relationship Cannot Describe an Accused's Constitutional Right to Counsel.

Cobb and his *amici* propose an additional rule of Sixth Amendment attachment. In their view, the attorney-client relationship itself causes the *constitutional* right to counsel to attach to offenses that have not been charged, but that arise from the same factual transaction as a charged offense. *See, e.g.*, Respondent's Brief, at 11; Defense amici, at 14-16. Without this "same transaction" rule, they argue, the police will have unfair access to criminal defendants and their attorneys will be unable to defend them adequately. *See*

Respondent's Brief, at 11-14; Defense amici, at 29. The rule is supposedly grounded in the "lay impressions" of criminal defendants, in the practical necessities of defense counsel, and in the typically coordinated nature of police investigations. Defense amici, at 14-15. *Amici* cite a number of circuit and state cases as support for the rule, and their primary authority in this Court's jurisprudence appears to be *Moulton*'s statement that the Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Defense amici, at 7 (quoting *Moulton*, 474 U.S., at 176).

But as explained above, none of the Court's precedents tie attachment of the right to counsel to the formation of the attorney-client relationship. Instead, the cases uniformly peg attachment on reaching a definite procedural stage—the "initiation of adversary judicial criminal proceedings." *See Kirby*, 406 U.S., at 689. *Moulton*'s observation that an accused can rely on counsel as a "medium" simply describes the role of counsel once adversary criminal proceedings have begun. *See* 474 U.S., at 176. In no sense does *Moulton* redefine the point at which the constitutional right to counsel attaches.

The Court rejected Cobb's expanded attachment argument fourteen years ago. In *Moran*, the Court considered whether formation of the attorney-client relationship itself triggered the Sixth Amendment right to counsel. 475 U.S., at 428-29. The defendant argued that the Sixth Amendment should protect the "integrity of the attorney-client relationship" regardless of the stage of the proceedings and that the Sixth Amendment ensures "the right to noninterference with an attorney's dealings with a criminal suspect." *Id.* The Court rejected these notions, explaining that the defendant's argument

> "misconceives the underlying purpose of the right to counsel. The Sixth Amendment's intended function is

> not to wrap a protective cloak around the attorney-client relationship any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any 'criminal prosecutio[n],' U.S. CONST. Amdt. 6, the accused shall not be left to his own devices in facing the prosecutorial forces of organized society." 475 U.S., at 430 (citations omitted).

Moreover, the Court rejected the notion that *Moulton* supports this "attorney-client" rule of attachment. 475 U.S., at 431 ("[B]ecause Moulton already had legal representation, the decision all but forecloses respondent's argument that the attorney-client relationship itself triggers the Sixth Amendment right."). The Court has since confirmed these principles by stating, in *Michigan v. Harvey*, that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of counsel." 494 U.S. 344, 352 (1990).

In arguing that the right to counsel extends to an entire transaction, *amici* seriously misread the "offense specific" requirement of *McNeil*. Defense amici, at 13. *Amici* admit that *McNeil* interprets a defendant's request for counsel at arraignment as indicating that he "might be willing to speak to the police without counsel present concerning many matters, *but not the matter under prosecution*." *Id.* (quoting *McNeil*, 501 U.S., at 178) (emphasis added). But instead of taking this statement at face value, *amici* construe it as a gloss on what "offense specific" means. Namely, they believe that "offense specificity" must take into account an accused's subjective perceptions about how far his request for counsel extends. Thus, *amici* contend " 'offense specific' . . . mean[s] only that the crime about which the state wishes to question [the defendant] is unlikely to be *totally immaterial* to the defendant's determination of whether he needs the guiding hand of counsel." Defense amici, at 13 (emphasis in original). *Amici* have turned *McNeil* on its head.

Their principal error lies in the belief that "offense specific" refers to a defendant's *invocation* of the right to counsel. *Id.* *McNeil* does not say that. Instead, *McNeil* emphasizes it is the *Sixth Amendment right to counsel* that is "offense specific":

> "The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for its does not attach until a prosecution is commenced . . . . And just as the right is offense specific, so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." 501 U.S., at 175 (citations omitted).

McNeil then links the content of the phrase "offense specific" to the objective, verifiable offense under indictment, and *not* to anything as malleable as an accused's secret, subjective belief about what his invocation meant to cover. *See id.*, at 175-76 (quoting *Moulton*, 474 U.S., at 180 & n.16; citing *Moran*, 475 U.S., at 431); *see* Petitioner's Brief, at 21. Contrary to *amici*'s argument, *McNeil* discussed the accused's probable state of mind merely to emphasize that his Sixth Amendment request for counsel is, as a factual matter, not equivalent to a Fifth Amendment request. 501 U.S., at 178.

Expanding on their misreading of *McNeil*, *amici* speculate about the possible contours of "offense specificity." First, they would expansively rely on the accused's "lay impression" that his request for counsel covers the entire factual transaction and not just the crime for which he has been indicted. Defense amici, at 13-14. But defining the scope of the Sixth Amendment's protections in subjective terms would be disastrous and utterly unworkable. An investigating officer can objectively understand the prophylactic scope of a Fifth Amendment *Edwards* invocation and, once an accused is charged with a particular

crime, an officer can understand a Sixth Amendment invocation objectively defined by the scope of the charge. But any expansion of the scope of the Sixth Amendment invocation unnecessarily forces a subjective determination, and *amici*'s proposition would require an investigator to undertake the impossible task of determining the accused's subjective state of mind before attempting to interrogate him. That radical assertion has no support in the text of the amendment, the Court's Sixth Amendment precedent, or logic. So interpreted, the Sixth Amendment would become nothing more than a charter for criminal evasion.[5]

Second, Cobb and *amici* warn that a charged-offense rule will hamstring defense attorneys' ability to effectively represent their clients as to factually-related but uncharged crimes. Respondent's Brief, at 12-13; Defense amici, at 14-15. This argument again confuses the scope of the attorney-client relationship with the scope of the constitutional right to counsel. The Sixth Amendment does not constitutionalize the attorney-client relationship; rather, it entitles an accused to rely on counsel's aid in defending against a criminal charge. *Moran*, 475 U.S., at 429-30; *Moulton*, 474 U.S., at 180 & n.16.[6] But in effectively representing a client, defense

[5] Contrary to *amici*'s arguments, the charged-offense rule demands no deep legal "sophistication" from criminal defendants. *Id.*, at 14. The rule requires that an accused merely be able to understand the nature of the charges. Cobb surely understood that the burglary charge to which he had confessed did not encompass the murders for which he was ultimately convicted. *See* Petitioner's Brief, at 23-24.

[6] *Amici*'s invocation of the ABA's "no-contact" rule, Defense amici, at 29 n.8, is a red herring. This Court has never indicated that ethical recommendations should govern the contours of the Sixth Amendment, and has in fact strongly suggested to the contrary. *See Moran*, 475 U.S., at 427-28 (rejecting as constitutional standards the "subconstitutional recommendations" of the ABA); *United States v. Henry*, 447 U.S. 264, 275 n.14 (1980) (indicating that DR 7-104(a)(1) "does not bear on the constitutional question in this case"). *See generally*, Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 732-33 (1996); Uviller, *supra*, at 1176-83.

counsel undoubtedly will consider the possibility that the client may be more of a criminal than initially thought. Counsel may also urge a client to disclose the full extent of his criminal liability for the transaction in question. And counsel may advise a client that, if questioned by police about the yet-uncharged offenses, he should end the interview immediately by invoking his (Fifth Amendment) right to counsel. Thus, the charged-offense rule cannot *prevent* a lawyer from "guiding" his accused client as to police investigations of related but uncharged crimes. *See, e.g.*, Defense amici, at 15. But the Sixth Amendment will not assist in that endeavor until his client is actually indicted for those crimes.[7]

Amici wrongly suggest that this is a "textbook" case for applying some form of "same transaction" or "closely related" exception to *McNeil*. Defense amici, at 16. The assertion that Ridley "behaved as though his attorney-client relationship with Cobb extended to all same transaction charges" sorely misrepresents the record. *See* Petitioner's Brief, at 2-3, 6-7, 29, 45-46; *see infra* Part III.B. Further, Texas has always conceded that the police believed all along that Cobb knew something about the disappearances. *See, e.g.*, Petitioner's Brief, at 3, 29, 46 n.10. But the police's subjective suspicions cannot influence either attachment of the right to counsel or its scope. Even if the police and Ridley assumed there was a pre-existing attorney-client relationship covering the murder investigation, that merely

[7] *Amici* illogically suggest that the coordinated nature of police investigations should also influence the scope of an accused's right to counsel. Defense amici, at 15-16. But, again, the scope of the right depends on the offense charged and not on the degree of police "cooperation" among different investigations.

begs the question whether the attorney-client relationship describes the scope of the Sixth Amendment right to counsel. The Court's precedents answer that question with a definitive "no." *See McNeil*, 501 U.S., at 175-76; *Moran*, 475 U.S, at 429-30; *Moulton*, 474 U.S., at 180 & n.16.

The expansive attachment rule urged by Cobb and his *amici* would transform the Sixth Amendment into a device for outlawing voluntary confession to crime. It would place an attorney at the defendant's elbow, even if he did not ask for one, during any interrogation concerning a crime even remotely related to a previously charged offense. The plain result—given that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances"—would be to muzzle confessions altogether. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).[8] This would be a strange and destructive interpretation of the constitutional right to counsel, particularly in light of the Court's recent statement that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil*, 501 U.S., at 181.

II. THE *BLOCKBURGER* COROLLARY APPLIES BY ANALOGY TO THE OFFENSE-SPECIFIC RIGHT TO COUNSEL.

Cobb and his *amici*'s attack on application of the charged-offense rule and a "same elements" *Blockburger* corollary to measure the extent of the Sixth Amendment right to counsel, Respondent's Brief, at 27-34; Defense amici, at 20-29, misapprehends Texas's position, the record, or both. The charged-offense rule arises directly from this Court's

[8] *See also* Uviller, *supra*, at 1161 ("To hold that an accused defendant shall not be interrogated, or even given the opportunity to speak to the police . . . except with a lawyer on hand, is simply to direct that they shall not be heard to speak their minds, period.").

consistent interpretation of the Sixth Amendment right to counsel. The same-elements corollary, which mirrors the familiar *Blockburger* double jeopardy test, simply reinforces the charged-offense rule. *See* Petitioner's Brief, at 26; *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The corollary would *protect* criminal defendants against mechanical circumvention of Sixth Amendment attachment. Moreover, its application to this case is fair, contrary to *amici*'s distortion of the undisputed record.

Amici attempt to establish textually that the gulf between the Fifth Amendment phrase "same offense" and the Sixth Amendment phrase "criminal prosecution" forecloses analogy between the two. Defense amici, at 20-21. Without citing a single authority, *amici* conclude that the "narrower" provisions of double jeopardy are inapposite to the "broader" Sixth Amendment provisions. *Id.* Had *amici* consulted a dictionary, they would have discovered that the two phrases share close kinship. "Offense" means, among other things, the "violation of law for which *penalty* is prescribed," and, specifically in the double jeopardy context, "the term means the same *crime* . . . ." BLACK'S LAW DICTIONARY 1081 (6th ed. 1990) (emphasis added). Similarly, "prosecution" refers to "a proceeding instituted and carried on by due course of law . . . for the purpose of determining the guilt or innocence of a person charged with *crime*." *Id.*, at 1221 (emphasis added). These definitions confirm what common sense suggests: an "offense" and a "prosecution" both center around a particular "crime." But more importantly, this Court has described the scope of the Sixth Amendment right to counsel as "offense specific" precisely because its attachment depends on the formal initiation of a "criminal proceeding." *McNeil*, 501 U.S., at 175-76. Text, context, and precedent thus reveal closer ties between the two clauses than *amici* wish to admit.

Amici's argument that precedent forbids cross-pollination between the clauses focuses on *Moulton* and *Brewer v. Williams*, 430 U.S. 387 (1977). They contend that both cases preclude a charged-offense or a same-elements rule because in each the Court, finding right-to-counsel violations, reversed not only charged offenses but also factually related, uncharged offenses. Defense amici, at 21-22. In its opening brief, Texas examined these cases at length, Petitioner's Brief, at 14-19 (*Moulton*); 19-20 (*Brewer*), and showed that (1) neither case addressed the relatedness issue, (2) the state neither raised nor briefed the issue in either case and even conceded Sixth Amendment attachment in *Brewer*, and (3) there were alternative explanations for reversal of the uncharged offenses. *See also* Brief of Amicus Curiae United States, at 19-24. Contrary to *amici*'s implicit assertion, Texas does not contend that *Brewer* and *Moulton* were wrongly decided. Rather, the lengthy treatment in Texas's brief reveals that its argument was, instead, that lower courts have read these cases for propositions they do not contain. *See, e.g.*, Petitioner's Brief, at 20.

Amici also draw inapt distinctions between the respective "purposes" and "interests" served by the double jeopardy and right to counsel clauses. Defense amici, at 24-25. It is unclear what pertinent difference there is between the purpose of double jeopardy (avoiding "successive prosecutions and . . . multiple punishments for the same offense") and the right to counsel (protecting an unaided defendant "at critical confrontations with his adversary"), at least regarding the definition of "offense." *Id.* The textual differences between the clauses are negligible now that *McNeil* has explicitly linked a Sixth Amendment "criminal proceeding" with a specific offense. 501 U.S., at 175-76. But in any event, to prove the alleged contrast *amici* must grossly overstate the interest protected by the Sixth Amendment. According to *amici*, that interest is "in having an expert assist [an accused] in all dealings with a sophisticated and committed adversary."

Defense amici, at 25. But this description far exceeds the narrower, charge-limited focus of the constitutional right to counsel found in *McNeil*, *Moran*, and *Moulton*.

Without any textual, precedential, or policy reasons to support their Sixth Amendment interpretation, *amici* improperly hypothesize that the police manipulated the murder investigation in order to deprive Cobb of his attorney's guidance. But contrary to *amici*'s assertion, the record contains not even the slightest hint of police manipulation. Walker County detective Judy James became involved in this case in January 1995, long after Cobb had confessed to the burglary. R.2.207. She met Cobb's appointed counsel, Ridley, in September 1995, when Cobb appeared in Huntsville to plead on the burglary charge. R.2.211-12. At that time, Ridley told James that he did not object to her talking to Cobb about the disappearances, although nothing came of the subsequent interview. R.2.212-17.

In early November 1995, Cobb's stepmother Deborah left a telephone message with the Walker County District Attorney's Office. R.2.218. The message was given to James, who called Deborah back. R.2.218-19. Deborah asked James to speak to Charles (Cobb's father), who told James that he was worried about Cobb and "wanted to know what he could do to help his son." R.2.220. James testified: "I told him if he wanted to help him, that he would have his son call me and tell me the truth; that Raymond needed to tell the truth." R.221; *see* R.2.269. Cobb never called James, but three days later Charles did, informing James that his son had implicated himself in the murders. R.2.222-23. Charles also told James that she should "get a warrant for Raymond because he stated that he would be leaving there in the morning." R.2.224.

The undisputed events that led to Cobb's arrest and confession to the murders show, not that the police manipulated the charges and the investigations to deprive Cobb of his right to counsel, but rather that they carefully

observed every safeguard to ensure both that they would secure the needed evidence, but also that they would be able to use it.

Finally, *amici*'s hypotheticals, purporting to demonstrate the "bizarre consequences" of applying Texas's attachment rule, Defense amici, at 28, do not articulate any legitimate harm that will result from applying Texas's rule. The only harm *amici* identify reveals their flawed conception of the breadth of the constitutional right to counsel. *Amici* hypothesize—without mentioning the broader Fifth Amendment protections—that a suspect's constitutional right to counsel is violated when, for instance, police question a suspect charged with statutory rape about a possible forcible rape offense, or a suspect charged with grand larceny about a possible robbery offense. Defense amici, at 28. But *amici* do not and cannot assert that failure to apply the Sixth Amendment to these hypothetical situations will deprive a suspect of the guidance of counsel, because a suspect faced with custodial interrogation may cut off questioning—and obtain counsel's aid—as to *any* subject simply by invoking his right to counsel under *Edwards*. *See, e.g.*, Petitioner's Brief, at 23-24. Neither Cobb nor his *amici* have ever addressed that overarching protection in protesting that criminal defendants will not be adequately protected without an expansive interpretation of "criminal proceeding."

The Sixth Amendment does not constitutionalize the attorney-client relationship, but ensures only that an accused may rely on counsel's advice in defending against a particular criminal charge. This is a narrower but far more balanced and manageable scope than *amici* propose. And, contrary to Cobb's and *amici*'s fears, *see* Respondent's Brief, at 28; Defense amici, at 29, its application is simple, depending only upon the substance of the charge that formally begins a "criminal proceeding." U.S. CONST. amend. VI.

III. COBB IS NOT ENTITLED TO THE PROTECTION OF *MICHIGAN v. JACKSON*.

A. *Jackson* Should Be Overruled.

Amici do not address Texas's argument that *Jackson* should be overruled. Petitioner's Brief, at 33-40. In his brief, however, Cobb wrongly asserts that Texas is, in effect, asking the Court to fundamentally alter its last quarter century of Sixth Amendment jurisprudence. Respondent's Brief, at 40-46. Cobb has overstated Texas's position.

Jackson is simply not woven into this Court's Sixth Amendment case law. Rather, it is an unwarranted extension of the *Edwards* rule outside the confines of custodial interrogation into a context where the rule makes no sense. Petitioner's Brief, at 34-35. In the fourteen years since it was decided, the Court has not revisited or expanded *Jackson*, but has, in fact, only limited its application. *See Harvey*, 494 U.S., at 350-54.

Since *Jackson* was decided, the Court has abandoned the already tenuous premises supporting the decision. Petitioner's Brief, at 36-38. *Patterson v. Illinois* clarifies that the state's decision to begin criminal proceedings does not perceptibly increase an accused's need for counsel during questioning. 487 U.S. 285, 298-99 (1988). *Davis* holds that an *Edwards* assertion—the Fifth Amendment equivalent to, and source of, a *Jackson* assertion—must be an unambiguous request for counsel's aid during custodial interrogation. *Davis v. United States*, 512 U.S. 452, 459 (1994). Neither the content nor the context of an accused's request for counsel at an arraignment or similar proceeding approaches the *Davis* standard of clarity. *See McNeil*, 501 U.S., at 178. Finally, *McNeil* completes the Court's abandonment of *Jackson*'s premises by holding that a defendant's Sixth Amendment request for counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81.

There is no longer any basis in the Court's cases for interpreting an accused's request for counsel at arraignment as the clear expression of a desire for counsel during questioning. The logical and practical underpinnings of *Jackson* have therefore evaporated.

Overruling *Jackson* will not only leave the rest of the Court's Sixth Amendment precedents unaffected but will also have no real effect on an accused's ability to cope with custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 467 (1966). An uncounseled accused who wishes to cut off questioning on *any* subject need only say four words, "I want my lawyer," and the Fifth Amendment will shield him from further police-initiated interrogation. *See Arizona v. Roberson*, 486 U.S. 675, 680-81 (1988); *Edwards*, 451 U.S., at 484. Neither Cobb nor his *amici* have ever explained why these broader Fifth Amendment safeguards do not accomplish what *Jackson* promises. Because the Fifth Amendment and *Edwards* adequately shield an accused from unwanted interrogation, "there simply is no room or need for an awkward adaptation of a further constitutional limitation such as the counsel clause of the sixth amendment." Uviller, *supra*, at 1154.

Jackson should be overruled.

B. Cobb Never Asserted His Right to Counsel.

Cobb and *amici* argue that Cobb invoked his right to counsel under *Michigan v. Jackson* by accepting appointed counsel on the burglary charge. *See* Defense amici, at 7-8. But mere acceptance of appointed counsel without more is insufficient to trigger *Jackson*'s heightened protection. *See* Petitioner's Brief, at 43-44. *Jackson* is triggered only by a defendant's affirmative, clear, and unambiguous request for

counsel, *id.*, at 43,[9] and simply accepting appointed counsel does not rise to that level of clarity.

No decision of this Court supports Cobb's argument. *Amici*'s claim that footnote 3 in *Patterson*, 487 U.S., at 290 n.3, shows that acceptance of appointed counsel activates *Jackson*, is unsupportable. Defense amici, at 8.[10] The accused in *Patterson* had been indicted but had not requested counsel. 487 U.S., at 290-91. Because the accused "at no time sought to exercise his right to have counsel present," the Court found *Jackson* inapplicable. *Id.*, at 291. The Court emphasized that "[o]ur decision in *Jackson* . . . turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police." *Id.* (quoting *Jackson*, 475 U.S., at 631, 633-35).

Patterson accepted the established rule that the accused was entitled to assistance of counsel at postindictment interviews. 487 U.S., at 290. But the Court added the following footnote to its discussion:

> "We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. [citing *Moulton*, 474 U.S., at 176]. The State conceded as much at oral argument. Indeed, the analysis changes

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[9] Cobb repeatedly asserts that he did, in fact, request counsel. *See* Respondent's Brief, at 23, 24, 44. But this alleged request appears nowhere in the record, as Texas specifically pointed out in its merits brief and its certiorari petition. *See* Petitioner's Brief, at 40; Pet. for Cert., at 20. Cobb did not address this factual contention in his opposition to Texas's petition and has therefore waived any objection to it. SUP. CT. R. 15(2).

[10] *Patterson* held that *Miranda* warnings would support waiver of an accused's Sixth Amendment right to counsel during postindictment questioning. 487 U.S., at 296.

> markedly once an accused even requests the assistance of counsel. [citing *Jackson*, 475 U.S., at 629-30]." *Patterson*, 487 U.S., at 290 n.3.

The first sentence of that footnote means only that "retention or acceptance of a lawyer gives rise to the substantive Sixth Amendment safeguards of *Maine v. Moulton* [citation omitted]." *Montoya v. Collins*, 955 F.2d 279, 283 (CA5 1992). It does not address what constitutes an invocation under *Jackson*.[11]

Patterson did not alter *Jackson*'s requirement that an accused invoke his right to counsel. To the contrary, *Patterson* reaffirmed *Jackson*'s assertion rule. *See Patterson*, 487 U.S., at 291. Moreover, this Court has uniformly declared, before and after *Patterson*, that an accused must affirmatively request counsel to trigger *Jackson*, and also that a represented accused may unilaterally waive his right to counsel and speak to police. *See* Petitioner's Brief, at 43 (collecting cases); *see also Harvey*, 494 U.S., at 352.[12] Additionally, *McNeil* did not "infer" an invocation of *Jackson* from the fact that a defendant had counsel at an initial appearance. Defense amici, at 8 (citing *McNeil*, 501 U.S., at 173). The defendant in *McNeil* contended as much, but the Court did not decide the issue because it was unnecessary to resolve the case. *See McNeil*, 501 U.S., at 175-76.

Finally, *amici* misrepresent the record when they erroneously contend that the police misled Ridley about their

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[11] *Accord State v. Carter*, 664 So.2d 367, 377, 380 (La. 1995). *Contra Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989); *Holloway v. State*, 780 S.W.2d 787, 795-96 (Tex. Crim. App. 1989).

[12] *Harvey* does not, as Cobb implies, conclude that simply having defense counsel invokes *Jackson*. Respondent's Brief, at 8. In *Harvey*, the state conceded a violation of *Jackson*. 494 U.S., at 349. The Court therefore did not address the invocation issue, nor does it appear from the facts of *Harvey* how the defendant invoked his right to counsel. *Id.*, at 346.

suspicions of Cobb. Defense amici, at 9; *see also id.*, at 27 n.7. This assertion is completely unsupported by the record. Ridley himself declined to testify that the police had misled him. Pet., at B-13. When Ridley was told that Cobb had confessed to the murders, Ridley did not complain that their attorney-client relationship had been "violated." Instead, Ridley candidly told the police that he didn't even know if he would be appointed to represent Cobb for the murders. Pet., at B-10.

Ridley himself repeatedly limited his representation of Cobb to the charged burglary alone. Pet., at B-2 to B-3, B-10 to B-11, B-12. While stating that he permitted police to question Cobb about the disappearances "believing he wasn't a suspect," Pet., at B-6, Ridley also confirmed that the police "always said they thought [Cobb] knew more than he was saying." Pet., at B-7; *see* Pet., at B-3. Furthermore, even if Ridley was confused about the police's suspicions, the confusion ended a full two months before Cobb confessed. According to Ridley, in September 1995, Walker County Sheriff Meyers told him that "he thought Cobb was a suspect all along. [Meyers] flat out told me he thought Cobb was guilty; he just couldn't prove it." Pet., at B-7; *see* Pet., at D-5 ¶17.

Amici's objection that the police's behavior "deprived" Cobb of his right to Ridley's guidance in dealing with the murder investigation, Defense amici, at 9, is also contradicted by the record. Ridley himself described the "guidance" he offered in an interview with Cobb and his father: "I gave [Cobb] my business card and told them if they were contacted by anyone, to get in touch with me." R.3.472; *see* Pet., at D-6 ¶19. But when Cobb was later questioned about the murders, he declined Ridley's advice and "never invoked his right to counsel at any time." *See* Pet., at D-3 ¶8.

That undisputed fact—that Cobb never invoked his right to counsel during custodial interrogation—is the beginning and

end of this case. Even if Cobb had a Sixth Amendment right to counsel at the time he was questioned, he simply declined to use it. Nor did he elect to end the interrogation by asking to see his attorney, even though Ridley had explicitly advised him to do so. Instead, Cobb did what has never been disputed in this case. He voluntarily confessed to two cruel murders, for which he was properly convicted.

CONCLUSION

The Court should reverse the decision of the Texas Court of Criminal Appeals.

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No. 99-1702

In the Supreme Court of the United States

TEXAS, PETITIONER

v.

RAYMOND LEVI COBB

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether the Sixth Amendment rule announced in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), which bars an officer from approaching a defendant to interrogate him on a charged offense when he has invoked the right to counsel, also applies to interrogation on a factually related but uncharged offense.

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In the Supreme Court of the United States

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TEXAS, PETITIONER

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RAYMOND LEVI COBB

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question in this case is whether the police violated respondent's Sixth Amendment rights under *Michigan* v. *Jackson*, 475 U.S. 625 (1986), by eliciting incriminating statements about respondent's murder of two individuals after respondent had been charged with the burglary of the individuals' home and was represented by counsel on that charge. The Court's resolution of that question will affect the conduct of interrogations by federal law enforcement officers and the admissibility in federal prosecutions of voluntary statements taken in comparable circumstances.

STATEMENT

1. On December 27, 1993, respondent stabbed and killed Margaret Owings while burglarizing her home. Respondent carried Margaret Owings' body to a wooded area near the home. Respondent then went back to the Owings' residence

where he saw Margaret Owings' sixteen-month-old daughter, Kori Rae Owings, sleeping in her bed. Respondent carried the child, who was still sleeping, to the woods where he had left her mother's body. After retrieving a shovel from his residence, which was located across the street from the Owings' residence, respondent returned to the woods where he began digging a hole. The child subsequently awoke, started to approach her mother, and fell into the hole. Respondent buried Margaret Owings together with her daughter, who thereafter died of suffocation. Pet. App. A3, A4-A5, A9-A10. Respondent returned to the Owings' residence and removed a stereo, VCR, videotapes, and a bottle of tequila. Pet. 4-5.

Later that day, Margaret Owings' husband, Lindsey Owings, notified the Walker County, Texas, Sheriff's Office that his wife and daughter were missing and that some of his property had been stolen from his home. In February 1994, the sheriff's office received an anonymous tip that respondent might have been involved in the burglary. Walker County investigators questioned respondent about the burglary, but respondent denied any involvement. On July 15, 1993, respondent, while under arrest on unrelated charges, executed a written statement confessing to the burglary, but he denied any knowledge of or involvement in the disappearances of Margaret and Kori Rae Owings. A Walker County grand jury subsequently indicted respondent for the burglary. Pet. App. A4.

In August 1994, an attorney, Hal Ridley, was appointed to represent respondent on the burglary charge.[1] Shortly thereafter, Walker County investigators sought and obtained Ridley's permission to question respondent about

[1] The attorney apparently was appointed by letter from the court before respondent's arraignment on the burglary charge. Pet. App. B1-B3, B5.

the disappearances of Margaret and Kori Rae Owings. Investigators then questioned respondent, who denied any involvement in the disappearances. On September 13, 1995, investigators, after consulting with Ridley, again questioned respondent, who maintained that he was not involved in the disappearances. Pet. App. A4-A5.

Thereafter, respondent, who was free on bail with respect to the burglary charge, began residing with his father in Odessa, Texas. On November 11, 1995, respondent's father telephoned the Walker County Sheriff's Office and reported that respondent had confessed to him that respondent had murdered Margaret Owings in the course of burglarizing her home. Walker County investigators obtained an arrest warrant, which they sent by telecopier to Odessa police for execution. The Walker County investigators did not inform the Odessa police that respondent was represented by counsel in connection with the burglary charge. Pet. App. A5.

On November 12, 1995, Odessa police arrested respondent, who waived his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and gave police a written confession to the murders of both Margaret and Kori Rae Owings. Pet. App. A5. Respondent thereafter led investigators to the location where he had buried the victims' bodies. Pet. 6.

2. Respondent was charged with the capital offense of intentionally killing two persons in the same criminal transaction, in violation of Texas Penal Code Ann. § 19.03(a)(7)(A) (West 1994).[2] Before trial, respondent moved to suppress his murder confession on the ground that it was obtained by

[2] The indictment also charged respondent with the capital offense of murder in the course of committing a burglary, in violation of Texas Penal Code Ann. § 19.03(a)(2) (West 1994). Before trial, however, the State abandoned that charge and proceeded against respondent solely on the charge of capital murder under Section 19.03(a)(7)(A). Pet. App. D4. The record does not reflect whether respondent was ever tried in a separate proceeding for burglary.

the Odessa police in violation of his Sixth Amendment right to counsel. After a hearing, the trial court denied the motion to suppress. Pet. App. D1-D7. The court concluded that respondent had waived his *Miranda* rights, voluntarily confessed to the murders, and led police to the area where he had buried Margaret and Kori Rae Owings. *Id.* at D3, D4. The court also observed that, although in August 1994 an attorney had been appointed to represent respondent on the burglary charge, that attorney conceded at the suppression hearing that "he was *not* [respondent's] attorney on the Capital Murder" charge when respondent confessed to the murders. *Id.* at D6.

3. By a 6-3 vote, the Court of Criminal Appeals of Texas reversed respondent's conviction. Pet. App. A1-A27. The court observed that the right to counsel guaranteed by the Sixth Amendment "attaches at the initiation of adversarial proceedings." *Id.* at A6. Under this Court's decision in *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986), the court noted, "once the right to counsel has attached and has been invoked, any subsequent waiver [of the right to counsel] during police-initiated interrogation is ineffective unless counsel has first given his permission for the interrogation." Pet. App. A6. The court also found "relevant to this case * * * the Sixth Amendment rule that once the right to counsel attaches to the offenses charged, it also attaches to any other offense that is very closely related factually to the offense charged." *Ibid.*

Applying those principles, the court held that "[o]nce [respondent] was indicted for the Owings burglary, his Sixth Amendment right to counsel attached to that offense and to the capital murder offense, which was factually interwoven with the burglary." Pet. App. A7. The court further held that respondent asserted his right to counsel "by accepting Ridley's appointment as his counsel." *Ibid.* The court therefore concluded that, "before the Odessa police could

lawfully question [respondent] about the disappearances of the Owings, they were under an obligation to contact Ridley and get his permission." *Ibid.* Because police failed to take those steps, the court ruled that the fruits of the interview, including respondent's written confession, were inadmissible in the prosecution's case-in-chief. *Ibid.*

Three judges dissented. Pet. App. A8-A27. In their view, the officers reasonably viewed the conduct of respondent's attorney as indicating his unqualified and continuing consent to the questioning of respondent as long as respondent did not object. *Id.* at A11-A16. They also expressed the view that respondent's acceptance of counsel was not an unequivocal assertion of his right to counsel sufficient to invoke the rule of *Michigan* v. *Jackson*. *Id.* at A21-A25.

SUMMARY OF ARGUMENT

A. The Sixth Amendment right to counsel is triggered by the initiation of adversary judicial proceedings in a criminal case. The rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986), protects a defendant whose Sixth Amendment right has attached and been invoked. In order to safeguard the defendant's ability to deal with the State on a charged crime through counsel, the Court concluded that a defendant's waiver of his right to counsel in police-initiated interrogation is invalid. One requirement for the application of *Michigan* v. *Jackson* is that the accused have previously invoked his right to counsel. A question in this case is whether respondent's *acceptance* of counsel on his burglary charge constituted the *request* for the help of a lawyer envisioned in *Jackson*. But whatever the answer to that question, the conclusive fact here is that the statements respondent gave were introduced, not on the then-pending burglary charges, but on capital murder charges that had not been brought at the time of the interrogation. The Sixth Amendment right

to counsel therefore had not attached on the murder charges, and *Michigan* v. *Jackson* does not bar use of the statements.

B. In *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991), this Court made clear that the Sixth Amendment right to counsel is "offense specific"; thus, "its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is [also] offense specific." The proper test to apply to the "offense specific" Sixth Amendment right is the same-elements test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), that the Court applies in Fifth Amendment Double Jeopardy analysis. That test asks whether each offense contains an element that the other does not. If each does, they are not the same offense. The test yields predictable results and can be readily applied to determine which offenses are the subject of a pending prosecution (for which the right to counsel has attached) and which are not.

C. An extension of the rule of *Michigan* v. *Jackson* to uncharged, but closely factually related offenses, is not justified. There is no reason to hold that the offenses involved in a "criminal prosecution[]" under the Sixth Amendment embrace uncharged offenses that have different elements. The purpose of the Sixth Amendment is to ensure that the defendant, in responding to formal accusations that have been brought in court, has the assistance of counsel to guide him through the intricacies of the criminal legal process. But that purpose does not extend to uncharged crimes that may be under investigation, even if they are factually related to the charged crimes. As to those offenses, the Sixth Amendment right has not even attached. The suspect is thus as capable as any other suspect of making a knowing and voluntary decision whether to assert his Fifth Amendment rights to silence and counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), or alternatively, to speak to law enforcement unaided.

D. This Court's decisions in *Brewer* v. *Williams*, 430 U.S. 387 (1977), and *Maine* v. *Moulton*, 474 U.S. 159 (1985), do not support the extension of *Michigan* v. *Jackson* to factually related crimes. In *Williams* and *Moulton*, the Court did reverse convictions because, after Sixth Amendment rights had been invoked on certain crimes, statements were improperly elicited on then-uncharged crimes. But whether the Sixth Amendment right had "attached" on those uncharged offenses when the statements were elicited was neither briefed nor argued, and it was not mentioned in either case. Those decisions thus do not control the question that now is squarely presented. And developments since that time—including the "offense specific" interpretation of the Sixth Amendment in *McNeil* and the adoption of an "elements" rather than a "same conduct" test under the Double Jeopardy Clause—undermine whatever precedential force *Williams* and *Moulton* might otherwise have had on the issue.

E. Finally, extension of *Michigan* v. *Jackson* to "factually related" but uncharged crimes would impose unjustified costs on society. Not only would such a test defy consistent and predictable application, but it would also result in the loss of some voluntary confessions obtained after compliance with the *Miranda* safeguards. A rule that suppresses such statements requires a substantial justification. Such a rule was found justified in *Michigan* v. *Jackson* to preserve the right to counsel once formal charges have been brought. But there is no similar justification when the State has neither formally charged a suspect with the offense about which he is asked nor attempted to use the suspect's incriminating statements in prosecuting the suspect on a charged offense. Extension of the prophylaxis of *Michigan* v. *Jackson* to uncharged offenses is thus unwarranted.

ARGUMENT

MICHIGAN v. *JACKSON* DOES NOT BAR THE ADMISSION OF RESPONDENT'S CONFESSION TO THE THEN-UNCHARGED OFFENSE OF CAPITAL MURDER

A. Respondent's Sixth Amendment Right To Counsel Had Attached On The Offense Of Burglary

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. As the text of the Sixth Amendment itself suggests, the right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991) (internal quotation marks and citation omitted); accord *Moran* v. *Burbine*, 475 U.S. 412, 428 (1986); *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984); *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977); *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion).

In *Michigan* v. *Jackson*, this Court established a prophylactic rule under the Sixth Amendment that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636; see *Michigan* v. *Harvey*, 494 U.S. 344, 345 (1990). The Court observed that it previously had held in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), that, under the Fifth Amendment's Self-Incrimination Clause, "an accused person in custody who has 'expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the

authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" 475 U.S. at 626 (quoting *Edwards*, 451 U.S. at 484-485). The Court in *Jackson* concluded that, because "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before[,] * * * the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation." *Id.* at 631, 632. If a defendant requests a lawyer with respect to a pending charge, the Court held, it would "presume that the defendant requests the lawyer's services at every critical stage of the prosecution," including police interrogation. *Id.* at 633.

The *Michigan* v. *Jackson* rule applies only when an accused invokes or asserts his Sixth Amendment right to counsel. In *Patterson* v. *Illinois*, 487 U.S. 285, 290 (1988), the Court declined to apply *Michigan* v. *Jackson* to suppress incriminating statements made by an accused who had been indicted and was in custody on murder charges, but who "at no time sought to exercise his right to have counsel present." The Court explained that its "decision in *Jackson* * * * turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police" and that "[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny—not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291 (quoting *Jackson*, 475 U.S. at 631). The Court in *Patterson* noted, however, that it was "significan[t] that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities,"

explaining that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." 487 U.S. at 290 n.3 (citing *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985)).

In this case, when respondent was formally charged with the offense of burglary, his Sixth Amendment right to counsel attached with respect to that offense. See *McNeil*, 501 U.S. at 175. The first question presented by the petition (Pet. i) is whether respondent invoked the protections of *Michigan* v. *Jackson* by accepting the appointment of counsel. Regardless of the resolution of that issue, however, *Michigan* v. *Jackson* did not bar the admission of respondent's statements. A critical fact is that respondent was not charged with the murders at the time of his interrogation. The state court therefore erred, as a threshold matter, in holding that the attachment of respondent's Sixth Amendment right to counsel with respect to the burglary offense extended as well to the then-uncharged offense of capital murder.

B. Respondent Had No Right To Counsel On The Uncharged Offense Of Capital Murder When He Confessed To That Offense

1. In *McNeil* v. *Wisconsin*, 501 U.S. at 175, this Court held that the Sixth Amendment right to counsel is "offense specific." That right therefore "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings." *Ibid.* (internal quotation marks and citation omitted). The Court in *McNeil* also stated that "just as the [Sixth Amendment] right is offense specific, so also its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *Ibid.*

In *McNeil*, those principles led the Court to hold that officers did not violate the defendant's Sixth Amendment rights when they questioned him about uncharged offenses of murder, attempted murder, and armed burglary while he was in custody and under indictment for armed robbery. 501 U.S. at 175-176. The Court explained that, "[b]ecause petitioner provided the statements at issue here before his Sixth Amendment right to counsel with respect to the [uncharged] offenses had been (or even could have been) invoked, that right poses no bar to the admission of the statements in this case." *Id.* at 176 (emphasis omitted).

Earlier, in *Maine* v. *Moulton*, 474 U.S. at 180 n.16, the Court made clear that, where the government used an undercover agent to investigate the ongoing or future commission of crimes by an indicted defendant, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment has not yet attached, are, of course, admissible at trial of those offenses." That holding necessarily entails the proposition that the Sixth Amendment protections on an indicted offense do not extend to all other crimes by the same defendant. See also *Moran* v. *Burbine*, 475 U.S. at 431 (interpreting *Moulton* to hold that "evidence concerning the crime for which the defendant had not been indicted * * * would be admissible at a trial limited to those charges"); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 458 n.21 (1986) (same); cf. *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964) (proper for government to continue investigation of suspected criminal activities of a defendant, even though the defendant already had been indicted and had retained counsel for pending charges); accord *Hoffa* v. *United States*, 385 U.S. 293, 308 (1966). The rationale for the offense-specific rule under the Sixth Amendment is well-settled: "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges

were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Maine* v. *Moulton*, 474 U.S. at 180.

2. Those principles dictate the conclusion that respondent's Sixth Amendment right to counsel had not attached with respect to the offense of capital murder when he confessed to that crime on November 12, 1995. At that time, although the State had charged respondent with burglary, the State had not charged him with capital murder or otherwise initiated formal adversary proceedings with respect to that offense. Thus, unless capital murder and burglary are the same "offense" for purposes of the Sixth Amendment, the Sixth Amendment and its protections under *Michigan* v. *Jackson* posed no bar to the admission of respondent's voluntary confession to the murders at his murder trial.

This Court has not defined what constitutes an "offense" for purposes of the Sixth Amendment. The Court's precedents firmly establish, however, that the question whether two factually related crimes constitute the same "offense" under the Fifth Amendment's Double Jeopardy Clause is determined by applying the "same elements" test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). See *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996); *United States* v. *Dixon*, 509 U.S. 688 (1993); cf. *Garrett* v. *United States*, 471 U.S. 773, 779, 790 (1985). If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. "This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Brown* v. *Ohio*, 432 U.S. 161, 166

(1977) (quoting *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17 (1975)).

While the Sixth Amendment refers to "criminal prosecutions," and the Double Jeopardy Clause to the "same offence," a single test should logically apply in both settings to determine whether an uncharged offense constitutes the same crime as the offense under indictment. The *Blockburger* test, moreover, is familiar to the courts and creates a bright-line rule that is easily administrable by judges, prosecutors, and law enforcement officers. Because it turns on the elements of the offenses charged in the indictment, it is of particular value to law enforcement officers who must decide at the outset of an investigation whether they may quesion an indicted suspect, after he has obtained counsel, about uncharged offenses.

Under *Blockburger*'s same elements test, the offenses of burglary and capital murder constitute separate offenses. To establish the crime of burglary under Texas Penal Code Ann. § 30.02(a)(1) (West 1994), the State must prove that a defendant entered a habitation, without the effective consent of the owner, with the intent to commit a felony or theft. By contrast, the offense of capital murder for the killing of two persons in a single criminal transaction under Texas Penal Code Ann. § 19.03(a)(7)(A) (West 1994) requires proof that the defendant committed murder by intentionally or knowingly causing the death of more than one individual during "a continuous and uninterrupted chain of conduct occurring over a very short period of time * * * in a rapid sequence of unbroken events." *Jackson* v. *State*, 17 S.W.3d 664, 669 (Tex. Crim. App. 2000) (quoting *Rios* v. *State*, 846 S.W.2d 310, 311-312 (Tex. Crim. App. 1992), cert. denied, 507 U.S. 1051 (1993)).[3] Because burglary and capital murder each

[3] The fact that burglary and capital murder contain dissimilar elements reflects the state legislature's view that the two crimes protect

"require[] proof of a fact which the other does not," *Blockburger*, 284 U.S. at 304, the two crimes are distinct offenses. Respondent's Sixth Amendment right to counsel with respect to the burglary charge therefore did not carry over to the capital murder charge, which had not been brought when respondent confessed to the murder.

C. The Sixth Amendment's Purposes Do Not Support Extension Of *Michigan* v. *Jackson* To An Uncharged Offense That Is Factually Related To A Charged Offense

1. In holding that "[o]nce [respondent] was indicted for the Owings burglary, his Sixth Amendment right to counsel attached * * * to the capital murder offense," Pet. App. A7, the state court relied (*id.* at A6-A7) on the decisions of lower courts that have concluded that there is an "exception" to the Sixth Amendment's offense-specific rule when police question a suspect about uncharged offenses that are "closely related" to or "inextricably intertwined" with the pending charges for which the defendant has invoked his Sixth Amendment right to counsel. See, *e.g.*, *United States* v. *Covarrubias*, 179 F.3d 1219 (9th Cir. 1999); *United States* v. *Arnold*, 106 F.3d 37, 40-41 (3d Cir. 1997); see also *United States* v. *Doherty*, 126 F.3d 769, 776 (6th Cir. 1997) (collecting federal and state cases), cert. denied, 524 U.S. 917 (1998). In applying that exception, courts have examined the conduct, time, place, motive, and victim with respect to an uncharged offense to determine whether it "arises from the same acts

distinct societal interests. Whereas the offense of capital murder is proscribed under Title 5 of the Texas Penal Code, entitled "Offenses Against The Person," burglary is proscribed under Title 7, entitled "Offenses Against Property." See generally 5 William Blackstone, *Blackstone's Commentaries* 177, 220 (Tucker ed. 1996) (explaining that homicide is a offense "injurious to the *persons* of private subjects" while burglary is an offense against the "*habitations* of individuals").

and factual predicates on which the pending charges were based." *Arnold*, 106 F.3d at 41; accord *Whittlesey* v. *Maryland*, 665 A.2d 223, 234 (Md. 1995), cert. denied, 516 U.S. 1148 (1996).

In this case, respondent's burglary and capital murder offenses did occur on the same day. But there was only a partial overlap in the place of the crimes and the victims. The burglary and the murder of one of the victims, Margaret Owings, occurred in the Owings' residence, while the murder of Kori Rae Owings occurred in the nearby woods. And the victims of the murders were Margaret and Kori Rae Owings, while the victims of the burglary were Margaret Owings and her husband, Lindsey Owings, who presumably owned the property taken from the residence. Pet. App. A3-A4, A9-A10. Importantly, respondent's conduct constituting each offense was distinct. Respondent committed burglary when he entered the Owings' residence with the intent to remove the stereo and other property from the residence. Texas Penal Code Ann. § 30.02(a)(1) (West 1994). Respondent committed capital murder when he stabbed Margaret Owings in her home, carried her body into the woods, returned to her home to retrieve her sixteen-month-old daughter, and buried the child alive along with her mother in the woods. Texas Penal Code Ann. § 19.03(a)(7)(A) (West 1994). Finally, respondent's motives for the two crimes were different. Respondent committed the burglary offense in order to obtain property from the Owings' residence. Respondent murdered Margaret and Kori Rae Owings because they witnessed the burglary. Br. in Opp. 14.[4] On balance, the distinctions

[4] Respondent contends (Br. in Opp. 14) that the two crimes are inextricably intertwined because the burglary "was the *precipitating event* which resulted in the murders, and was the *clear motive* for these killings, i.e., to escape detection for said burglary." But "committing a crime is separate from an attempt to avoid responsibility for it." *Whittlesey*, 665 A.2d at 236; see also *Hendricks* v. *Vasquez*, 974 F.2d 1099,

between the two offenses—different conduct, different motive, and a lack of symmetry in the victims and location—should lead to the conclusion that respondent's burglary offense was not, as the court below held (Pet. App. A7), "factually interwoven" with respondent's capital murder offense.

2. Our fundamental submission, however, is that a multifactored approach of this character should be rejected. The Sixth Amendment's text and purpose do not justify barring police from questioning a suspect about an uncharged offense simply because it is closely related factually to a charged offense.

Under the Sixth Amendment, an "accused" has the right to counsel to assist in his defense of a "criminal prosecution[]." Thus, once any suspect is charged with an offense, the Sixth Amendment right to counsel attaches with respect to *that* offense.[5] See p. 8, *supra*. Assuming that the accused thereafter invokes his right to counsel (see *Patterson*, *supra*), the Sixth Amendment as amplified by *Michigan* v. *Jackson* bars the police from initiating questioning concerning that offense. See *McNeil* v. *Wisconsin*, 501 U.S. at 180; *Maine* v. *Moulton*, 474 U.S. at 180. With respect to uncharged, albeit closely related, offenses, however, the State has not initiated formal adversary proceedings, and thus there is no "prosecution" to which the right to counsel can attach. See *United States* v. *Ash*, 413 U.S. 300, 32. 322

1104 (9th Cir. 1992) (concluding murder charges and a charge of interstate flight to avoid prosecution for the murder charges "were separate incidents" and were "neither 'inextricably intertwined' * * * nor did they arise from the same conduct).

[5] In felony cases, the Sixth Amendment entitles an indigent defendant to appointment of counsel in any felony case, while in a misdemeanor case, appointed counsel is required only if the charge results in a sentence of imprisonment. See *Nichols* v. *United States*, 511 U.S. 738, 743 & n.9 (1994).

(1973) (Stewart, J., concurring) ("The requirement that there be a 'prosecution,' means that this constitutional 'right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused.]") (quoting *Kirby* v. *Illinois*, 406 U.S. at 688 (plurality opinion)).

This Court has recognized that "[t]he purpose of the Sixth Amendment counsel guarantee * * * is to 'protect the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil* v. *Wisconsin*, 501 U.S. at 177-178 (brackets omitted) (quoting *Gouveia*, 467 U.S. at 189); see also *Arizona* v. *Roberson*, 486 U.S. 675, 685 (1988) (Sixth Amendment right to counsel "arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him").[6] Indeed, in *Michigan* v. *Jackson*, the Court emphasized the "significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel," and acknowledged that the Amendment's purpose is not triggered unless the State has accused an individual of committing a specific offense:

> Given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adver-

[6] By contrast, the Court has explained that the protection of the Fifth Amendment's Self-Incrimination Clause is "broader" than the Sixth Amendment right to counsel to the extent that the Fifth Amendment "relates to interrogation regarding *any* suspected crime and attaches whether or not the 'adversarial relationship' produced by a pending prosecution has yet arisen." *McNeil* v. *Wisconsin*, 501 U.S. at 178; see also *Arizona* v. *Roberson*, 486 U.S. at 685.

> sary proceedings 'is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U.S., at 689. It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'

475 U.S. at 631 (quoting *Gouveia*, 467 U.S. at 189).

Absent the considerations present when a State has brought charges against a suspect alleging a specific offense, the purposes of the Sixth Amendment do not support a rule that prevents the police from approaching a suspect who can then "mak[e] an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. at 291; see also *McNeil* v. *Wisconsin*, 501 U.S. at 178 ("One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution."); *Michigan* v. *Harvey*, 494 U.S. at 353 ("Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising his free will."); *Moran* v. *Burbine*, 475 U.S. at 430 ("The Sixth Amendment's intended function is not * * * to protect a suspect from the consequences of his own candor.").

Moreover, if the suspect is in custody, the Fifth Amendment as interpreted by *Miranda* requires police to advise the suspect of his right to counsel, which the suspect may invoke at any time to cause the police to cease their questioning. As this Court in *McNeil* v. *Wisconsin*, explained:

> If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that

> when they give him the *Miranda* warnings. There is not the remotest chance that he will feel "badgered" by their asking to talk to him without counsel present, since the subject will not be the charge on which he has already requested counsel's assistance (for in that event *Jackson* would preclude initiation of the interview) and he will not have rejected uncounseled interrogation on *any* subject before (for in that event, *Edwards* would preclude initiation of the interview).

501 U.S. at 180. Thus, in the absence of any indication by the defendant that he does not want to talk to police about an uncharged offense, even one that is factually related to a pending charge, *Michigan* v. *Jackson*'s prophylactic rule should not be extended to exclude a defendant's voluntary confession to the uncharged offense.

D. This Court's Decisions Do Not Support A Sixth Amendment Exception For Factually Related Offenses

Many lower courts have reasoned that an exception to the Sixth Amendment's offense-specific rule for factually related crimes is supported by this Court's decisions in *Brewer* v. *Williams*, *supra*, and *Maine* v. *Moulton*, *supra*, in which the Court reversed convictions on charges that had not been brought against the defendants in those cases at the time the incriminating statements at issue were made. See, *e.g.*, *Covarrubias*, 179 F.3d at 1223-1224; *United States* v. *Melgar*, 139 F.3d 1005, 1011-1014 (4th Cir. 1998); *Doherty*, 126 F.3d at 776; *Arnold*, 106 F.3d at 40-41; *United States* v. *Carpenter*, 963 F.2d 736, 740 (5th Cir.), cert. denied, 506 U.S. 927 (1992); *People* v. *Clankie*, 530 N.E.2d 448, 462-463 (Ill. 1988).[7]

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[7] In finding that the Sixth Amendment right to counsel attaches with respect to factually related uncharged offenses, the Sixth Circuit in *Doherty*, 126 F.3d at 776, also relied on this Court's decision in *Illinois* v. *Perkins*, 496 U.S. 292 (1990). In *Perkins*, the Court held that the Sixth

In *Brewer*, a defendant who had been formally charged with a child's abduction, and who had retained counsel with respect to that charge, was being transported by police from the city where he had surrendered to the city where the abduction had occurred. A detective traveling with the defendant elicited from the defendant the location of the child's body by expressing the view that the parents were entitled to a "Christian burial" for their child. 430 U.S. at 390-394. On habeas review of the defendant's conviction on murder charges, the Court held that the police violated the defendant's Sixth Amendment right to counsel when police questioned him outside the presence of his attorneys, reasoning that the police "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." *Id.* at 399. The Court further held that the defendant did not intentionally relinquish his right to counsel, explaining that his "consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right." *Id.* at 404.

In *Moulton*, the defendant was indicted on, and retained counsel with respect to, four counts of theft of vehicles and automotive parts. Thereafter, a co-defendant, Colson, began

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Amendment did not bar the State's use of an undercover agent to question the defendant about a murder while he was imprisoned on an unrelated battery conviction, reasoning that "[i]n the instant case no charges had been filed on the *subject* of the interrogation, and our Sixth Amendment precedents are not applicable." *Id.* at 299 (emphasis added). Focusing on the highlighted language, the court in *Doherty* concluded that "it is the subject matter of the interrogation, and not any formal distinction in the elements of the underlying charges, that is relevant for Sixth Amendment purposes." 126 F.3d at 776. The highlighted language is most naturally read, however, to mean that, had the defendant been formally charged with offenses relating to the murder, and had the defendant invoked his right to counsel for those charges, the State would have been barred from seeking incriminating statements about those charges without the presence of counsel.

cooperating with police and secretly tape-recorded conversations with the defendant in which the defendant made incriminating statements about the thefts as well as the defendant's plan to kill one of the witnesses on the theft charges. 474 U.S. at 162-166. In holding that "the State violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant, Colson," the Court reasoned that "[t]he police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel." *Id.* at 176, 177. The Court rejected the contention that the police conduct was excused because the police were investigating the defendant's attempts to kill the witness to the theft charges. *Id.* at 178-180. The Court therefore affirmed the state court's decision, which had reversed the defendant's conviction for theft as well as a burglary offense that the State had charged after Colson began cooperating with the authorities. *Id.* at 167, 180.

Although the Court in *Brewer* and *Moulton* reversed convictions with respect to offenses that had not been charged at the time that the defendant made incriminating statments (the offense of murder in *Brewer* and of burglary in *Moulton*), neither decision actually addressed the issue of whether the Sixth Amendment attaches to uncharged, factually related offenses, and it does not appear that the State raised the point in either case. The Court in this case accordingly is "free to address the issue on the merits." *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, * * * and such assumptions * * * are not binding in future cases that directly raise the questions."); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (stating that prior decision is not controlling when

issue "was not there raised in briefs or argument nor discussed in the opinion of the Court"). Indeed, the Court in *Moulton* explicitly limited the reach of its decision to the State's obtaining of incriminating evidence that pertained to pending charges to which the Sixth Amendment had attached at the time that the police obtained the evidence. 474 U.S. at 180 n.16 ("Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses."); see also *Moran* v. *Burbine*, 475 U.S. at 431 ("The Court [in *Moulton*] made clear * * * that the evidence concerning the crime for which the defendant had not been indicted * * * would be admissible at a trial limited to those charges."). In suggesting that the State could have used the incriminating statements made by the defendant in a prosecution for the defendant's attempt to kill a witness to the charged theft offenses, 474 U.S. at 179-180 & n.16; see also *id.* at 185 (Burger, C.J., dissenting), the Court implicitly rejected the principle that the Sixth Amendment attaches to all offenses that have some factual relationship to the charged offense.[8]

In any event, both *Brewer* and *Moulton* predate *McNeil*, in which the Court expressly articulated the principle that

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[8] *Brewer* also involved the distinguishing feature that the police deliberately circumvented the defendant's Sixth Amendment right to counsel with respect to the abduction charge by breaching an agreement with the defendant's attorneys that police would not question the defendant while they transported him across the state. See 430 U.S. at 404-405; *id.* at 413-414 n.2 (Powell, J., concurring) ("Here, we have a * * * case * * * in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement."); *id.* at 415 (Stevens, J., concurring) ("If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.").

the Sixth Amendment right to counsel is "offense specific." 501 U.S. at 175. *McNeil*, of course, did involve factually unrelated offenses. The accused in that case had invoked his Sixth Amendment right to counsel on a pending armed robbery charge, while the police questioned him about uncharged murder and burglary offenses that had occurred in a town different from where armed robbery had occurred. *Id.* at 173-174. Nothing in the Court's opinion in *McNeil*, however, suggests that the Court's holding turned on the fact that the uncharged and charged offenses were factually unrelated, or even that the Court deemed it relevant that the two offenses were unrelated. Rather, the Court relied solely on the fact that the accused had "provided the statements at issue * * * before his Sixth Amendment right to counsel with respect to the [uncharged] offenses had been (or even could have been) invoked." *Id.* at 176 (emphasis omitted).

Similarly, both *Brewer* and *Moulton* were decided before *Dixon*, *supra*, which adopted *Blockburger*'s "same elements" test to determine whether a defendant is being subjected to successive punishment or prosecutions for the same criminal offense, in violation of the Fifth Amendment's Double Jeopardy Clause. 509 U.S. at 703-704; cf. *Garrett* v. *United States*, *supra*. In reaching that conclusion, the Court in *Dixon*, 509 U.S. at 709, overruled its decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990), which had held that, in addition to the same-elements test, a subsequent prosecution must satisfy a "same-conduct" test that barred the State from bringing "a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government w[ould] prove conduct that constitute[d] an offense for which the defendant ha[d] already been prosecuted." *Id.* at 510. The Court in *Dixon* concluded that it was "compellingly clear" that *Grady* "was a mistake," reasoning that the same-conduct test "proved unstable in application"

and was "a continuing source of confusion." 509 U.S. at 709-711. Now that the Court has adopted the same-elements test in interpreting the word "offense" under the Fifth Amendment, it would be highly anomalous for the Court to conclude that the Sixth Amendment's offense-specific rule is to be applied not only by examining the elements of the charged and uncharged offenses, but also by asking whether the offenses are "very closely related factually." Pet. App. A6.

E. An Exception For Factually Related Offenses Would Be Unworkable And Would Impose Unjustified Costs

1. This Court's adverse experience with the "same conduct" test of *Grady* v. *Corbin* strongly counsels in favor of adopting the same-elements test as the exclusive test to determine whether the Sixth Amendment permits police to question a suspect about uncharged offenses. Indeed, in two other instances, this Court has recognized the practical difficulties created by rules—other than an elements test—for determining the requisite degree of relationship between two offenses. In *Schmuck* v. *United States*, 489 U.S. 705, 709 (1989), the Court rejected an "inherent relationship" test that would have required an offense to be submitted to jury as lesser-included offense when "two offenses relate[d] to the protection of the same interests and the proof of the greater offense [could] generally be expected to require proof of the lesser offense." The Court explained that the "inherent relationship" test is "rife with the potential for confusion," while the elements test "promotes judicial economy by providing a clearer rule of decision." *Id.* at 720-721. Similarly, in *Hopkins* v. *Reeves*, 524 U.S. 88, 97 (1998), the Court held that the Constitution does not require state trial courts to instruct juries in capital cases on a "'lesser related offense'—when no lesser included offense exists." Such an instruction, the Court reasoned, would be "unworkable,"

because "there would be no basis for determining the offenses for which instructions are warranted." *Ibid.*

Like the tests rejected in *Grady*, *Schmuck*, and *Reeves*, the test applied by the decision below—whether an uncharged offense is "factually interwoven with" or "very closely related factually to the offense charged" (Pet. App. A6, A7)—is too imprecise and indeterminate to support a workable rule to govern police interrogations. The courts that have embraced an exception to the Sixth Amendment's offense-specific rule have looked to a wide variety of factors, none of which is necessarily controlling in a given case. As the Ninth Circuit has explained:

> Deciding whether the exception is applicable requires an examination and comparison of all the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes. No single factor is ordinarily dispositive; nor need all of the factors favor application of the exception in order for the offenses to be deemed inextricably intertwined or closely related.

Covarrubias, 179 F.3d at 1225.

Because of the sheer number of factors that bear on whether an uncharged offense "is very closely related factually to the offense charged" (Pet. App. A6), it is difficult for courts to fashion a coherent body of law that achieves similar outcomes on comparable facts. Compare *Arnold*, 106 F.3d at 42 (witness intimidation charge based on defendant's threat to a witness and attempted murder charge based on defendant's subsequent hiring of a hit man to kill the witness were "sufficiently related for purposes of the Sixth Amendment exception" because the defendant's "central purpose and the intended results of both offenses were the same"), with *United States* v. *Cooper*, 949 F.2d 737, 744 (5th Cir.

1991) (rejecting claim that state offense of aggravated robbery was inextricably intertwined with federal offense of possession of an unregistered weapon, because two crimes "concern different conduct, although efficiently for the governments, both prosecutions could use much of the same evidence"), cert. denied, 504 U.S. 975 (1992).

Furthermore, because law enforcement officials must determine in advance whether they may question an accused about uncharged offenses, a Sixth Amendment exception for "very closely related" crimes (Pet. App. A6) poses even more difficulties in application than the same-conduct test that this Court in *Dixon* rejected under the Fifth Amendment. In many instances, officers will not know, before approaching a suspect to ask about an unindicted crime, all of the factual circumstances that could render that crime "closely related" to or "inextricably intertwined" with the charged crime. As a result, the question whether a court later will conclude that the right to counsel on the earlier crime extended to uncharged crimes will be unpredictable. The approach embraced by the decision below therefore would have the adverse practical effect of discouraging law enforcement officers from approaching a suspect about criminal activity and thereby would "unnecessarily frustrate the public's interest in the investigation of criminal activities." *McNeil*, 501 U.S. at 176 (quoting *Maine* v. *Moulton*, 474 U.S. at 180); see also *Massiah*, 377 U.S. at 207. At a minimum, the exception to the offense-specific rule obscures the "clear, 'bright line'" that *Michigan* v. *Jackson* intended to create so that police may conform their conduct accordingly. 475 U.S. at 634.

2. The intrusion on police investigatory work is not justified by any countervailing considerations. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies * * * should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449

U.S. 361, 364 (1981); see also *Michigan* v. *Harvey*, 494 U.S. at 346 (declining to bar the State from using a statement taken in violation of *Michigan* v. *Jackson* to impeach a defendant's false or inconsistent testimony). In this case, extending the rule of *Michigan* v. *Jackson* to factually related uncharged offenses would impose serious costs without providing a sufficient benefit.

The Court repeatedly has observed that the exclusion of a voluntary confession deprives the trier of fact of "what concededly is relevant evidence." *Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986) (quoting *United States* v. *Janis*, 428 U.S. 433, 449 (1976)); see also *United States* v. *Havens*, 446 U.S. 620, 627 (1980); *United States* v. *Calandra*, 414 U.S. 338 (1974). The Court likewise has made clear that "the ready ability to obtain uncoerced confessions," far from being an evil, is an "unmitigated good." *McNeil* v. *Wisconsin*, 501 U.S. at 181. Thus, as the Court in *Moran* v. *Burbine* observed: "Admissions of guilt are more than merely 'desirable' * * * they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." 475 U.S. at 426 (quoting *United States* v. *Washington*, 431 U.S. 181, 186 (1977)); see also *Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985); *id.* at 312 (the loss of "highly probative evidence of a voluntary confession" is a "high cost to legitimate law enforcement activity"); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (noting the "acknowledged need for police questioning as a tool for the effective enforcement of criminal laws"). Confessions, if obtained by fair methods that guarantee their reliability, result in the resolution of many cases that could not otherwise be solved, ensure confidence in the accuracy of criminal judgments, reduce the risk of prosecuting or convicting innocent persons, and alleviate burdens on all segments of the criminal justice system. *Ibid.* Extension of *Michigan* v. *Jackson* to uncharged offenses, with the effect of excluding voluntary, re-

liable confessions from evidence, therefore would require a substantial justification.

No such justification is present here. Courts have purported to justify the application of *Michigan* v. *Jackson* to factually related offenses because "to hold otherwise would allow the government to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes after questioning him without counsel present." *Arnold*, 106 F.3d at 41 (internal brackets and quotation marks omitted); see also *Melgar*, 139 F.3d at 1013; *Doherty*, 126 F.3d at 776; Pet. App. A7.[9] That reasoning, however, presupposes that a suspect has a Sixth Amendment right to counsel with respect to offenses for which he has not been formally charged. That conclusion is incorrect. See pp. 10-12, 16-19, *supra*. In any event, there is no indication in this case that the State attempted to circumvent respondent's right to counsel on the burglary offense when police questioned him about the murder offenses on November 12, 1995, and later charged him with the murder that he confessed to committing.[10] Respondent at that time

[9] The state court also asserted that the exception "prevents the government from circumventing the Sixth Amendment right to counsel merely * * * by charging predicate crimes with the purpose of questioning a suspect on an aggravated crime." Pet. App. A7 (internal quotation marks and citation omitted). Under *Blockburger*'s same-elements test, however, an aggravated offense would be the same offense as the predicate crime and the State thus would be precluded under *Michigan* v. *Jackson* from approaching the suspect about either offense.

[10] Nor is there any reason to believe that the police believed that they had enough evidence to charge respondent with the offense of capital murder when he was indicted for burglary. Pet. App. B3-B4, B7. More generally, applying the rule of *Michigan* v. *Jackson* to closely related uncharged offenses cannot be justified in order to prevent police from deliberately filing only a subset of the provable charges in the hopes of circumventing an indicted defendant's right to counsel. For purposes of bail and plea bargaining, officials typically have an incentive to bring the most serious charges that would support an indictment against an accused.

had already confessed to the burglary, Pet. App. A4, and the State was not continuing its investigation of the charged burglary offense under the guise of investigating uncharged crimes. Nor did the State use any of the incriminating statements that respondent made on November 12, 1995, to prosecute respondent for the offense of burglary. Cf. note 2, *supra*. There is therefore no basis for applying *Michigan* v. *Jackson*'s prophylactic rule to exclude respondent's voluntary confession to the capital murder offense.

CONCLUSION

The decision of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

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BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AND THE COMBINED LAW ENFORCEMENT ASSOCIATIONS OF TEXAS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but factually related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

The National Association of Police Organizations (NAPO) is a non-profit organization that represents state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that advances the interests of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 organizations with more than 220,000 sworn law enforcement officers and 11,000 retired officers.

The Combined Law Enforcement Associations of Texas (CLEAT) is a non-profit organization that represents state and local law enforcement officers in Texas and advances the interests and legal rights of law enforcement officers. It is the largest and one of the oldest state law enforcement labor organizations in Texas. CLEAT represents over 12,000 peace officers, correctional officers, public safety employees, and other board-approved classes of members.

Both NAPO and CLEAT and the officers they represent have a direct and immediate interest in any issues that affect the ability of law enforcement officers to investigate crimes. This case presents precisely such issues. If upheld, the Texas Court of Criminal Appeals' decision would create a wholly unworkable rule for the law enforcement profession. Here, even though officers in one Texas jurisdiction had no knowledge of respondent's indictment or retention of counsel on a burglary charge in another jurisdiction 500 miles away, and even though they scrupulously adhered to all requirements to warn respondent of his rights and to secure a valid waiver before questioning him on the distinct charge of murder, respondent's confession to a double murder was suppressed.

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

A rule requiring suppression of a voluntary statement of a confessed murderer obtained through entirely good-faith and proper police work will do nothing but hamstring legitimate police efforts to solve crimes and take offenders off the streets. Neither this Court's precedents nor the Constitution requires this result.

STATEMENT OF THE CASE

On December 27, 1993, respondent Raymond Levi Cobb brutally murdered and secretly buried Margaret Owings and her baby daughter Kori Rae in the course of burglarizing their home. Cobb was soon questioned by Walker County police about the burglary, and he confessed to that crime. He denied involvement, however, in the disappearance of Margaret and Kori Rae. Cobb was then indicted for burglary and counsel was appointed for him on that charge. *See* Pet. App. A-4.

After he was released on bail, Cobb moved more than 500 miles away to Odessa, Texas. While there in 1995, he confessed to his father that he had murdered Margaret and Kori Rae. Cobb's father reported the confession to the Odessa police, who contacted the Walker County Sheriff's office and obtained an arrest warrant for the murder. Unaware that Cobb had been indicted and had accepted appointed counsel for the burglary charge, the Odessa police arrested him and informed him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). In fact, they provided Cobb with more protection than *Miranda* requires, advising him of his rights in writing and obtaining a written waiver, which Cobb signed before a witness. Cobb then signed a written statement confessing to the murders. Pet. App. A-5. He was subsequently convicted of the double murder and sentenced to death.

The Texas Court of Criminal Appeals overturned the conviction on the ground that the confession violated Cobb's Sixth Amendment right to counsel. According to the court

below, "once the right to counsel attaches to [an] offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." *Id.* at A-6. The court concluded that the double murder was "factually interwoven" with the burglary, and thus that Cobb's Sixth Amendment right to counsel with respect to the murders had attached upon the indictment for the burglary. *See id.* at A-7.

The court also held Cobb's waiver of the right to counsel invalid because he had "asserted" his right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), by "accepting appointment [of] counsel" for the burglary charge. Pet. App. A-7. The court held that "once the right to counsel has attached and has been invoked, any subsequent waiver during police-initiated interrogation is ineffective unless counsel has first given permission for the interrogation." *Id.* at A-6. The court concluded that it made no difference that the Odessa police had acted in good faith and had not known about the prior burglary indictment. It held that the court should "'impute the State's knowledge from one state actor to another.'" *Id.* at A-7 (quoting *Jackson*, 475 U.S. at 634).

SUMMARY OF ARGUMENT

1. The "essence" of the prophylactic rule created in *Michigan v. Jackson* is "[p]reserving the integrity of an accused's *choice* to communicate with police only through counsel." *Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (emphasis added). An affirmative *assertion* of the right to counsel is thus crucial for invoking the protections of *Jackson*.

The court below improperly expanded *Jackson* beyond its logical limits by applying it where the defendant had never *asserted* his right to counsel at all. Respondent here merely accepted a court appointment of counsel. The acceptance of counsel and the creation of an attorney-client relationship have nothing to do with a defendant's expressed *choice* to deal with

police solely through counsel. And it was that *choice* that *Jackson* was designed to protect. Expanding the prophylactic rule of *Jackson* beyond the limits of the rationale that justified its creation will serve only to hamper legitimate police efforts to solve crimes.

2. The Sixth Amendment right to counsel, and the *Jackson* prophylactic rule, are offense-specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991). Nothing in this Court's precedents supports the lower court's conclusion that there should be an exception to the rule of offense-specificity where an uncharged crime is "closely related factualiy" to an offense that has been charged. Pet. App. A-6.

Even if the Court were inclined to recognize some exception to the offense-specific character of the Sixth Amendment right to counsel (a course that *amici* do not advocate), at a minimum the Court should not endorse the vague standard used below. A test based on the malleable touchstone of whether two crimes are "closely related factually" would produce utterly unpredictable results and thus would not provide law enforcement officers reliable guidance to inform their conduct. Any exception to the rule of offense-specificity, therefore, should be based on an examination of the conduct that defines the offenses in question. Two crimes should be considered "closely related" only where the same conduct satisfies the elements of both crimes.

3. By expansively applying *Jackson* even to cases where a defendant has never affirmatively asserted his right to counsel and by broadly interpreting the standard for determining whether two offenses are "closely related," the court below has created an unworkable rule that will unduly hinder legitimate police efforts to solve crimes and take offenders off the streets.

ARGUMENT

I. THE LOWER COURT ERRED BY APPLYING THE PROPHYLACTIC RULE OF *MICHIGAN v. JACKSON* IN A CASE WHERE THE ACCUSED NEVER AFFIRMATIVELY INVOKED HIS RIGHT TO COUNSEL.

In *Michigan v. Jackson*, this Court concluded that, after a criminal defendant's Sixth Amendment rights have attached and the defendant has asserted his right to counsel, police may not initiate questioning to obtain a valid waiver of the defendant's Sixth Amendment rights. *See* 475 U.S. at 630-36. As explained below, the rule in *Jackson* hinges on the defendant's affirmative *assertion* of his right to counsel and is designed to preserve the defendant's *choice* to deal with police solely through counsel. The court below, however, applied *Jackson* even though respondent had never asserted his right to counsel at all and had simply accepted counsel appointed by a court. That is a wholly unwarranted expansion of *Jackson* that will not advance the interests protected by the declared rationale of the case. Instead, it will only hinder legitimate police efforts at solving crimes.

In *Michigan v. Jackson*, this Court determined that once formal criminal proceedings have been initiated against a suspect on a particular charge, thereby triggering attachment of the Sixth Amendment right to counsel, and the suspect has asserted his right to counsel, the suspect cannot subsequently make a valid waiver of the right in a police-initiated interrogation unless counsel is present. In essence, the Court extended to the Sixth Amendment the rule developed in the context of the Fifth Amendment right to counsel in *Edwards v. Arizona*, 451 U.S. 477 (1981). Under *Edwards*, it is conclusively presumed that once a suspect has invoked his right to counsel, any subsequent waiver of the right to counsel in a police-initiated interrogation will be invalid, unless made in the

presence of counsel. The logic of the rule announced in *Jackson* necessarily hinged on the accused's affirmative *assertion* of his right to counsel. The Court, indeed, explained its ruling in precisely those terms. It noted that *Edwards*, on which it relied, "is grounded in the understanding that the *assertion* of the right to counsel is a significant event, and that additional safeguards are necessary when the accused *asks for* counsel." *Jackson*, 475 U.S. at 636 (emphases added) (internal citations and quotation marks omitted). The *Jackson* Court went on to make clear that an affirmative assertion of the right was similarly the touchstone in the Sixth Amendment context: "We conclude that the *assertion* is no less significant, and the need for additional safeguards no less clear, when the *request for counsel* is made at an arraignment and when the basis for the claim is the Sixth Amendment." *Id.* at 636 (emphases added).

In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Court reiterated that an accused must actually *invoke* the right to counsel to enjoy the protections of *Jackson*. The accused in *Patterson* had never asserted his right to counsel, but nonetheless claimed that once his Sixth Amendment rights attached at indictment, police were thereafter barred from initiating contact with him. *Id.* at 290. The Court rejected this argument and explained that the "decision in *Jackson* . . . turned on the fact that the accused 'ha[d] *asked* for the help of a lawyer' in dealing with the police." *Id.* (quoting *Jackson*, 475 U.S. at 631) (emphasis added). *Patterson* thus confirmed that "the essence of *Edwards* and its progeny" is "[p]reserving the integrity of an accused's choice to communicate with police only through counsel" – "not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291 (emphasis in original).

The Court subsequently reaffirmed the rationale behind *Jackson* in *Michigan v. Harvey*, 494 U.S. 344 (1990). There, the Court explained that the purpose of the rule in *Jackson*, like the rule in *Edwards*, is to "prevent police from badgering a defendant into waiving his *previously asserted*" rights. *Id.* at 350 (emphasis added). The decision was thus "based on the supposition that suspects who *assert* their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Id.* (emphasis added). Where there has never been any assertion of the right in the first place, the logic behind *Jackson* simply does not apply.

Jackson, in short, is a decision that brings the protections of the Sixth Amendment to bear in support of an individual's exercise of free will. The key for securing the benefit of *Jackson* is that the accused must make an affirmative *assertion* of the right to counsel indicating the he has decided to deal with the government through the medium of counsel.[2]

The Texas Court of Criminal Appeals extended *Jackson* far beyond the rationale underpinning the decision by applying it to a defendant who had never *asserted* his right to counsel at all, but had simply accepted a court-appointed counsel. That novel approach finds no basis in this Court's precedents and should be rejected as an unwarranted extension

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[2] Several lower courts have recognized the foundations of the *Jackson* rule and have understood that *Jackson* cannot logically be extended to the situation where an accused, rather than affirmatively seeking counsel, simply accepts appointment of counsel. *See, e.g.*, *State v. Carter*, 664 So. 2d 367, 383, 380 (La. 1995) ("[s]omething more than mere mute acquiescence in the appointment of counsel" is necessary to trigger *Jackson*); *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992) ("For purposes of *Jackson*, an 'assertion' means some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel.'"(citation omitted)).

of *Jackson* that is completely unrelated to the announced purpose of the prophylactic protections created in that case.

At the outset, this Court should examine any attempt to expand *Jackson* beyond its logical underpinnings with particular skepticism, because the rule applied in *Jackson* is not a constitutional requirement in itself, but rather a "prophylactic rule." *Harvey*, 494 U.S. at 345. *Jackson*, after all, "simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment." *Id.* at 350. And it is settled that *Edwards* "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). Indeed, it is really a "*second layer* of prophylaxis for the *Miranda* right to counsel." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991) (emphasis added). *See also Harvey*, 494 U.S. at 350 (*Edwards* is a "second layer of protection").

The Court must be particularly careful in expanding the reach of this prophylactic rule because, as the Court has already acknowledged, broadening the application of *Jackson* could "seriously impede effective law enforcement." *McNeil*, 501 U.S. at 180.[3] Precisely because it sweeps more broadly than the Constitution requires, *Jackson*'s prophylactic rule already will "render some otherwise valid waivers of constitutional rights invalid." *Harvey*, 494 U.S. at 353; *see also id.* at 345 (*Jackson* presumes certain waivers invalid "even if voluntary, knowing, and intelligent under traditional standards").

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[3] *Cf. also Arizona v. Roberson*, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting) (Court must ensure that justification for any expansion of prophylactic rules is consistent "with the practical realities of suspects' rights and police investigations"); *id.* at 691 ("Balance is essential when the Court fashions rules which are preventative and do not themselves stem from violation of a constitutional right.").

Expanding *Jackson* would thus necessarily have a high cost in terms of prohibiting constitutionally permissible police efforts at solving crimes.

Indeed, in this regard, it bears emphasizing that wherever *Jackson* is applied, it automatically forecloses any police attempts even to initiate an interview with an accused in order to obtain a confession through a knowing, constitutionally valid waiver of rights. Obtaining confessions through voluntary waivers, however, is *crucial* for solving crimes. As this Court has often reiterated, admissions of guilt resulting from valid waivers of rights "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citation omitted). Expanding the application of *Jackson* unnecessarily would thus interfere with one of the most critical tools police have for solving crimes and obtaining the evidence needed to secure convictions. Precisely because "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," *McNeil*, 501 U.S. at 181, expansion of *Jackson* must be carefully circumscribed to avoid unjustifiably hampering legitimate law enforcement efforts. Unwarranted expansion of the rule would only frustrate proper police investigations and ensure that "society would be the loser." *Id.*

Any extension of *Jackson* beyond its current confines, moreover, must be treated warily for a further reason: the *Jackson* rule already contains an element of artificiality designed to provide overinclusive protection of a suspect's Sixth Amendment rights. As this Court explained in *McNeil*, by foreclosing police-initiated questioning once a charged suspect has invoked his right to counsel, *Jackson* effectively assumes that *any* assertion of the right to counsel after the Sixth Amendment has attached indicates that the suspect wishes to have counsel present during any contact with investigators.

See 501 U.S. at 179-80. But there is not necessarily a basis in fact for that assumption. When a defendant makes a general statement at an arraignment, for example, indicating that he would like to have appointed counsel, there is no reason to think that he is thereby indicating an unwillingness to undergo *any* custodial interview without an attorney. *See id.* To the contrary, it is entirely possible that, while a suspect may want the assistance of counsel for trial and other more formal stages of the criminal process, he would remain willing to speak to investigators in an interview without counsel present. *Cf. Patterson*, 487 U.S. at 294 n.6, 297-300 (describing limited role that counsel would play in post-indictment questioning). The Court, however, to ensure that defendant's rights are protected, has decided that such a request should be "legally presumed" to amount to an indication that the accused wants the assistance of counsel in *all* settings. *McNeil*, 501 U.S. at 179.

Extending the rule of *Jackson* even further to apply where a suspect has made *no* request for counsel, but has merely been appointed counsel, simply makes no sense given the concerns that animated creation of the prophylactic rule in the first place. It would foreclose legitimate police efforts to obtain voluntary statements from a charged suspect even where the suspect had never expressed either a desire to have counsel present during interviews or even a general desire to have the assistance of counsel after formal criminal proceedings had begun. Rather, it would bar police-initiated contact solely because counsel had been appointed. But that result in no way furthers the objectives behind the *Jackson* rule, which was designed to protect a suspect's "*choice* to communicate with police only through counsel." *Patterson*, 487 U.S. at 291 (emphasis added).

The courts that have concluded that the appointment of counsel should trigger the full protections of *Jackson* have

simply cut *Jackson* loose from its anchor in the suspect's affirmative assertion of his right to counsel. In so doing, they have typically relied on ambiguous *dicta* from this Court's decisions in *Patterson* and *Moran v. Burbine*, 475 U.S. 412 (1986).[4] In *Patterson*, the Court held that an indicted suspect not represented by counsel could validly waive his Sixth Amendment right to counsel by waiving the rights described in *Miranda* warnings. *See* 487 U.S. at 292-95. The Court noted in a footnote that it was "a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *id.* at 290 n.3. (citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). In *Moran*, the Court indicated, also in *dicta*, that "once the [Sixth Amendment] right has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a ' "medium" between [the suspect] and the State' during the interrogation." *Moran*, 475 U.S. at 428 (also citing *Moulton*, 474 U.S. at176).

But the *dicta* outlined above in no way support the expansive view that the mere appointment of counsel somehow justifies triggering *Jackson*. In both *Patterson* and *Moran*, when the Court vaguely suggested that the Sixth Amendment provided special protections where an attorney-client relationship existed, it relied on *Maine v. Moulton*. *Moulton* was the end of a line of cases involving efforts by investigators to obtain incriminating statements from suspects through covert means (*e.g.*, through informants) after Sixth Amendment rights had attached. *See, e.g., Massiah v. United States*, 377 U.S. 201

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[4] *See, e.g., Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989); *Holloway v. State*, 780 S.W.2d 787, 783 (Tex. Crim. App. 1989).

(1964). As this Court has explained, those cases stand for the principle that "once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements 'deliberately elicited' from a defendant *without an express waiver of the right to counsel*." *Harvey*, 494 U.S. at 348 (emphasis added). The constitutional infirmity in cases from the line that started with *Massiah* and culminated in *Moulton* arose because investigators were attempting to obtain statements through surreptitious means and thus necessarily failed to obtain a knowing and intelligent waiver of the accused's Sixth Amendment right to counsel. *See Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) ("As our recent examination of this Sixth Amendment issue in *Moulton* makes clear, the primary concern of the *Massiah* line of decisions is *secret* interrogation by investigatory techniques that are the equivalent of direct police interrogation.") (emphasis added). A knowing waiver was simply not possible where such covert techniques were used.[5]

Nothing in those decisions, however, suggests that the mere appointment of counsel (or creation of an attorney-client relationship) makes it impossible for police to approach a suspect *openly* in an effort to obtain a knowing and intelligent waiver of the right to the presence of counsel at a post-indictment interview. The Court's reference in *Patterson* to the distinct "safeguards" provided to the "attorney-client relationship," coupled with its citation to *Moulton*, *see* 487 U.S. at 290 n.3, are thus explained entirely by the fact that in

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[5] *See United States v. Henry*, 447 U.S. 264, 273 (1980) ("[T]he concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government."); *cf.* 2 LaFave & Israel, Criminal Procedure § 6.4(f) (2d ed. 1999) ("Waiver is a possibility only when the defendant makes a statement to one known to be in a position adverse to him.").

Moulton and similar cases, the Court has concluded that investigative techniques that are fully permissible in other contexts (such as the use of informants) are impermissible after Sixth Amendment rights have attached and a defendant is represented by counsel. But the Court has never suggested that an accused cannot validly waive his Sixth Amendment right to counsel on a theory that representation by counsel, without more, renders any waiver made in the absence of counsel presumptively invalid under *Jackson*.

Indeed, reliance on *Moran* for the proposition that the creation of an attorney-client relationship triggers some special Sixth Amendment protection is particularly misguided for a further reason. The *Moran* Court itself made it clear that appointment of counsel was not an event of independent significance that triggered special Sixth Amendment protections:

> [T]he suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor.

Id. at 430. The Court went on to explain that its decision in *Moulton* "all but forecloses [the] argument that the attorney-client relationship itself triggers the Sixth Amendment right." *Id.* In *Moulton*, a defendant who was represented by counsel made statements to a police informant about several crimes, only some of which were already the subject of an indictment. The *Moran* Court explained that the statements obtained in *Moulton* concerning *unindicted* crimes could have been used in

a trial on those crimes, even though the statements were obtained from a defendant represented by counsel. *See* 475 U.S. at 431. The Court's reasoning in *Moran* thus undermines any assertion that the appointment of counsel in itself creates a distinct, specially protected Sixth Amendment interest warranting the application of *Jackson*'s prophylactic rule.[6]

In short, nothing in this Court's decisions suggests that the mere appointment of counsel should render a defendant incapable of waiving his rights in a police-initiated interview, after appropriate warnings. *Cf. Patterson*, 487 U.S. at 292-97. To the contrary, the mere acceptance of appointed counsel has nothing whatever to do with the rationale underpinning the prophylactic rule adopted in *Jackson*. As explained above, *Jackson* "is based on the supposition that suspects who *assert* their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Harvey*, 494 U.S. at 350 (emphasis added). Where a defendant has never invoked his right to counsel to begin with, the vital foundation for that supposition is lacking. And there is no basis for concluding that the appointment of counsel itself, without more, should somehow be treated as a surrogate for an indication that the

[6] It is true that the *Moran* Court suggested that the Sixth Amendment right to counsel will provide a special protection in that it precludes "interfere[nce] with the efforts of a defendant's *attorney* to act as a 'medium between the suspect and the State.'" *Moran*, 475 U.S. at 428 (emphasis added) (citation omitted). The Court was there addressing a refusal by police to allow an attorney to contact his client during questioning, *see id.* at 416-18, and made clear that under Fifth Amendment analysis, the efforts of the *attorney* to contact the defendant were irrelevant. But even if the Sixth Amendment would provide some protection to an *attorney's* efforts to act as the intermediary between his client and police (as distinct from the *defendant's* assertion of his right to counsel), such a rule is irrelevant here. There is no suggestion in this case that respondent's appointed attorney, like the attorney in *Moran*, was turned away while attempting to contact respondent.

accused wishes to deal with police solely through counsel. To make that leap would be to cut *Jackson* loose entirely from the rationale that justified its prophylactic rule in the first place.

Moreover, far from suggesting that the appointment of counsel will render an accused incapable of validly waiving his right to counsel on his own, this Court made it express in *Michigan v. Harvey* that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." 494 U.S. at 352.[7] *Harvey* emphasized that the Court has "explicitly declined to hold that a defendant who has obtained counsel cannot *himself* waive his right to counsel." *Id.* (emphasis added). Thus, the *Harvey* Court pointed out that in *Brewer v. Williams*, 430 U.S. 387 (1977), the Court went out of its way to emphasize that it was *not* holding that an indicted suspect who was represented by counsel and who was subjected to a police-initiated interview "could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments," *id.* at 405-06. The Court has thus consistently preserved the possibility that even a defendant who has been appointed

[7] The statement in *Harvey* that "once a defendant obtains or even requests counsel . . . analysis of the waiver issue changes," 494 U.S. at 352, does not suggest any different result. In particular, it cannot be read to suggest that, once a defendant "obtains" counsel by having counsel appointed, the full protections of *Jackson* automatically apply. To the contrary, the *Harvey* Court immediately went on to explain expressly that "we have explicitly declined to hold that a defendant who has *obtained* counsel cannot himself waive his right to counsel." *Id.* (citing *Brewer v. Williams*, 430 U.S. 387, 405-06 (1977)) (emphasis added). The *Brewer* case to which the Court pointed as an example, moreover, involved a police-initiated interview. Thus, there can be no argument that, in holding open the possibility of waiver even for an accused who has counsel, the *Harvey* Court was considering solely a defendant-initiated contact with police.

counsel can be approached by the police in an effort to obtain a voluntary waiver of Sixth Amendment rights.

Any other result would run flatly counter to the often-repeated principle that the protections afforded in *Jackson* and *Edwards* are designed to protect a suspect's *own decision* to exercise his constitutional rights. To presume that, merely because counsel has been appointed, a defendant who has never announced a desire to deal with police solely through an attorney (or even a desire to *have* an attorney, for that matter) is somehow automatically rendered incapable of waiving his right to counsel in a police-initiated interview would run flatly counter to this Court's admonition that the "Sixth Amendment does not disable a criminal defendant from exercising his free will." *Harvey*, 494 U.S. at 353. To hold that the appointment of counsel, without more, triggers application of *Jackson* – thereby effectively disabling a defendant from responding to a police-initiated interview – "would be to 'imprison a man in his privileges and call it the Constitution.'" *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)). The Court has consistently rejected such a course.

In sum, this Court's decisions make clear that the mere passive acceptance of appointed counsel does not trigger application of *Jackson*'s prophylactic rule. Even where a suspect has been indicted and appointed counsel, if he has never *asserted* his right to counsel and police initiate an interview by giving *Miranda* warnings and obtaining a waiver, that waiver is a valid relinquishment of Sixth Amendment rights. *Cf. Patterson*, 487 U.S. at 292-94.[8] Respondent Cobb

[8] This Court has consistently treated the ethical restrictions limiting prosecuting attorneys from contacting defendants represented by counsel as "not bear[ing] on the constitutional question" of a violation of Sixth Amendment rights. *United States v. Henry*, 447 U.S. 264, 275 n. 14 (1980) (continued...)

never affirmatively asserted his right to counsel; instead, he made a valid waiver of his rights after he was *Mirandized* by the Odessa police. Thus, even assuming that respondent's Sixth Amendment rights with respect to the double murder charge attached upon his indictment for the distinct crime of burglary, *but see infra* pp. 17-27, the lower court erred in excluding his voluntary confession to the double murder.

II. UPON INDICTMENT FOR ONE CRIME, THE RIGHT TO COUNSEL DOES NOT ATTACH FOR EVERY OTHER CRIME THAT COULD BE CONSIDERED "FACTUALLY RELATED."

The court below also committed a second and independent error in reversing Cobb's conviction. This Court has long held that the Sixth Amendment right to counsel is offense specific: it attaches only to the particular offense charged when formal criminal proceedings begin. *See, e.g., McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Nevertheless, the Texas court here joined a number of other lower courts in adopting an exception to the offense-specific character of the right when a defendant is involved in multiple crimes that are, in some sense, "closely related." Under this exception, once the Sixth Amendment right attaches to one offense, it attaches to all "closely related" offenses and, similarly, an assertion of the right to counsel under *Jackson* applies to all "closely related" offenses. As the court below put it, the right attaches "to any other offense that is *very closely related factually* to the offense charged." Pet. App. A-6 (emphasis added). In this case, application of this exception led to the exclusion of respondent's confession to murder, even though he had been

[8] (...continued)
(citing Disciplinary Rule 7-104(A)(1)). *Amici*, therefore, do not here address the rules of professional conduct.

indicted (and had even arguably "asserted" his right to counsel) solely for the distinct crime of burglary.

The lower court's use of such an expansive exception to the offense-specific character of the Sixth Amendment right plainly warrants reversal. To begin with, the "closely related" exception has never been mandated by a decision of this Court. In addition, even if the Court were to endorse such an exception here, it should not adopt the broad, "factually related" standard endorsed below. Any exception to the offense-specific rule necessarily carries heavy costs in terms of frustrating legitimate police efforts to investigate uncharged (and unsolved) crimes. *See, e.g.*, *Moulton*, 474 U.S. at 180. If the Court endorses the exception at all, therefore, it should adopt a narrow "conduct-based" version of the exception, rather than the broad and unpredictable "factually related" variant used below.

A. This Court's Precedents Do Not Support a "Closely Related" Exception to the Offense-Specific Character of the Right to Counsel.

This Court has repeatedly held that the Sixth Amendment right to counsel is offense specific. *See McNeil*, 501 U.S. at 175; *see also Moulton*, 474 U.S. at 180 & n.16; *United States v. Gouveia*, 467 U.S. 180, 188 (1984). And just as the right itself is offense specific, "so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *McNeil*, 501 U.S. at 175. Nevertheless, some lower courts, including the court below in this case, have created an exception to the offense-specific character of the Sixth Amendment right. Here, the court below ruled that respondent's right to counsel for the crime of burglary carried over to the capital murder charge because the events surrounding the two crimes were "factually interwoven." Pet. App. A-7. Lower courts have typically purported to derive this "closely related" exception from two cases: *Brewer v. Williams*, 430 U.S. 387 (1977); and *Maine v.*

Moulton, 474 U.S. 159 (1985). *See, e.g.*, *United States v. Arnold*, 106 F.3d 37, 40-42 & n.1 (3d Cir. 1997).

It is true that in both *Brewer* and *Moulton*, (i) the defendant had been indicted and was represented by counsel on one crime; (ii) subsequent efforts by authorities elicited incriminating statements on another crime (not yet the subject of an indictment); and (iii) the Court still excluded the statements. In *Brewer*, police interviewed a suspect indicted for *kidnapping* and obtained statements implicating him in the *murder* of the kidnapping victim. The statements were held inadmissible in the trial for murder. *See Brewer*, 430 U.S. at 400. In *Moulton*, both Moulton and an accomplice were indicted for the *theft* of several vehicles and assorted auto parts and each retained counsel. The accomplice then aided police in obtaining incriminating statements from Moulton, and the statements were used to bring new indictments, including one for burglary for breaking into a car dealership to steal the auto parts. At trial, Moulton was convicted of *burglary* and *theft* in connection with two vehicles and the auto parts. *See Moulton*, 474 U.S. at 167. The Court, however, held the statements inadmissible. *See id.* 474 U.S. at 180.

Neither case, however, can be read as broadly establishing a general "closely related" exception. To the contrary, several factors demonstrate that the cases cannot be stretched in that fashion.

First, neither case mentioned, much less expressly approved, an exception to the rule that the Sixth Amendment is offense specific. *Moulton*, in fact, went to considerable lengths to emphasize the costs that would be imposed *without* the rule of offense-specificity. The Court explained that "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, *would unnecessarily frustrate the public's*

interest in the investigation of criminal activities." 474 U.S. at 180 (emphasis added). Accordingly, the Court held in unequivocal terms that "[i]ncriminating statements pertaining to . . . crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses," *id.* at 180 n.16, even if obtained in the course of investigating "crimes for which formal charges have already been filed," *id.* at 179. The Court, moreover, later quoted *Moulton* extensively in reaffirming the rule of offense specificity in *McNeil*. *See* 501 U.S. at 175-76. *Cf. Whittlesey v. State*, 665 A.2d 223, 233-34 & n.8 (Md. 1995) (expressing doubt that *Moulton* and *Brewer* support any "closely related" exception).

Second, *Brewer* and *Moulton* both pre-date *McNeil*. Thus, even assuming they might once have been interpreted to support a "closely related" exception, *McNeil* undermines such a reading. *See, e.g.*, *People v. Clair*, 828 P.2d 705, 722 (Cal. 1992) (declaring *Brewer* "no longer vital" in the wake of *McNeil*).

Third, both *Brewer* and *Moulton* are, at bottom, *sui generis* decisions directed at what the Court considered to be unusual instances of inappropriate conduct by prosecuting authorities. In *Brewer*, the investigating officers assured the suspect's lawyer that they would not interrogate the suspect while transporting him across Iowa. Having made that agreement, the officers proceeded to engage the suspect in a conversation that the Court found tantamount to an interrogation, and thus violated the agreement with the suspect's lawyer. *See Brewer*, 430 U.S. at 390-91. The Court relied on the existence of the agreement in explaining its decision, *see id.*, 430 U.S. at 401 n.8, and Justice Stevens, whose vote was essential to the 5-4 decision, relied heavily on the agreement in his concurring opinion. *See id.*, 430 U.S. at

415 (Stevens, J., concurring). *See also Whittlesey*, 665 A.2d at 234 n.8 (distinguishing *Brewer* on this basis).

In *Moulton*, similarly, the Court declared the incriminating statements inadmissible after remarking critically on what it viewed as deceptive "conceal[ment]" by the police, and on their "knowing[] circumvent[ion]" of the defendant's Sixth Amendment rights. 474 U.S. at 177, 180. The Court found that police had used an undercover informant to elicit statements from Moulton when they "knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel." *Id.* at 177. Accordingly, the Court found that this *de facto* interrogation-by-agent concerning a crime for which the defendant had been charged violated the Sixth Amendment.

The holdings in *Brewer* and *Moulton* were thus linked to the Court's view that the police conduct in question involved (for case-specific reasons) some impropriety. Consequently, those decisions have limited application beyond their specific facts. To the extent they suggest that any sort of "closely related" exception should exist at all, they suggest the exception should be limited to similar cases involving some form of bad faith conduct deliberately aimed at circumventing Sixth Amendment rights. *Cf. United States v. Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992) (suggesting that inquiry into misconduct by prosecutorial authorities is a critical part of the "closely related" exception); *cf. also Whittlesey*, 665 A.2d at 234-35 (identifying line of cases that requires "evidence of deliberate police misconduct" for application of the "closely related" exception). A "closely related" exception limited in that fashion, moreover, would have no application in this case. There is not the slightest suggestion of police misconduct here. Rather, there is no indication that the officers who obtained respondent's confession were even aware of the burglary indictment, and the record makes it abundantly clear that they

scrupulously followed *Miranda* procedures to warn respondent of his rights.

Brewer and *Moulton*, in short, cannot be read to undermine the clarity of the rule reaffirmed subsequently in *McNeil*: "The Sixth Amendment right . . . is offense specific." 501 U.S. at 175. There is no basis for creating an exception for uncharged offenses that are in some sense "closely related" to the offense for which the Sixth Amendment right has attached.

B. Even Were the Court To Conclude That an Exception to the Rule of Offense Specificity Is Warranted, It Should Reject the Unpredictable and Unworkable Test Adopted Below.

If the Court holds that a "closely related" exception is warranted at all, it should reject the expansive version of that exception that was applied below. The Texas Court of Criminal Appeals declared that the capital murder charge here was "closely related" to the burglary charge simply because the two were "factually interwoven." Pet. App. A-7.

Construing the "closely related" exception in so broad a fashion – as encompassing any uncharged crime that can be viewed, in hindsight, as factually related to the charged offense – would make the exception utterly unpredictable and unworkable. Such a malleable test would all too often frustrate good-faith police work – just as it did in this case. As facts are unfolding in the course of an investigation, it would often be impossible to tell whether, under such a vague standard, a court might later consider distinct offenses part of a sufficiently intertwined series of facts to warrant carrying over Sixth Amendment protections from one crime to another. The rank-and-file membership of NAPO and CLEAT – the officers who are charged with implementing this Court's decisions on a daily basis in real-life situations – require clearer guidance in order

properly to balance effective law enforcement with respect for suspects' constitutional rights. This Court itself, indeed, has "frequently emphasized" the importance of rules that have a "clear, 'bright-line' quality." *Michigan v. Jackson*, 475 U.S. at 634.

If the Court recognizes a "closely related" exception at all, therefore, it should limit it to cases in which the conduct constituting the offense for which the accused has already invoked counsel *is the same conduct required to establish the offense (or an element of the offense) for which the State elicits information*. *Cf. Blockburger v. United States*, 284 U.S. 299, 304 (1932). Such a bright-line rule would provide better guidance for law enforcement officers investigating crimes and is the only version of the exception that even arguably finds support in this Court's precedents.

1. A "fact-based" test is unpredictable and produces inconsistent outcomes.

The unpredictability of the "fact-based" approach to determining whether two offenses are "closely related" is aptly illustrated by the confusing array of factors considered by the lower courts following that test. For example, in *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999), the Ninth Circuit concluded that federal *immigration offenses* were closely related to state *kidnapping* offenses. There, the defendants had driven eight illegal aliens from Los Angeles to Washington State for a fee (hence the immigration charges). When one illegal alien refused to pay, the defendants held him hostage and demanded payment from his family (thus the kidnapping charge). *Id.* at 1221. The Ninth Circuit explained that it was necessary to consider "all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any) and the timing, motive, and location of the crimes." *Id.* at 1225. Upon considering these factors, it concluded that the two

offenses were "closely related" for Sixth Amendment purposes because they arose from the same overall venture – the trip from L.A. to Washington. *Id.* at 1226. *See also United States v. Arnold*, 106 F.3d 37, 42 (3d Cir. 1997) (listing similar array of factors to consider, including whether the crimes "arise from the same facts and circumstances" and "are closely related in time").

In *United States v. Nocella*, 849 F.2d 33 (1st Cir. 1988), the fact-based test produced a different result. There, a single, lengthy investigation into the defendant's drug trafficking activities produced evidence of marijuana possession (on which defendant was indicted under state law and appointed counsel) and later evidence of distributing cocaine. Upon the federal trial for distributing cocaine, the court concluded that the two crimes were not "closely related." In the court's view, "the cocaine sales, though conceptually linked to the marijuana possession if broad rubrics like 'drug-related' are employed, were to all meaningful intents and purposes distinct offenses." *Id.* at 38. It seems likely, however, that a court considering some of the vague formulations of the fact-based test (including, for example, whether crimes were part of the same course of criminal conduct) might have concluded that these two drug-trafficking crimes *were* closely related.

In short, the determination whether two crimes constitute part of the "same venture," or arise from a "common base of evidence," or are "connected" can turn on a countless variety of unpredictable factors, including the time frame that a court considers, *see, e.g.*, *People v. Clankie*, 530 N.E. 2d 448, 452 (Ill. 1988) (four separate burglaries of a home during one-month period constituted one course of conduct); the level of generality at which the court describes the criminal "venture," *see Nocella*, *supra;* and so on.

These myriad factors provide such limitless flexibility that different judges could easily come to different conclusions

on the same facts. Under such a test, front-line officers thus would have no way to predict whether an apparently distinct crime might later, in hindsight, be deemed factually related to another crime for which a suspect had already been indicted. *Cf., e.g.*, *United States v. Olsen*, 840 F. Supp. 842, 852 (D. Utah 1993) ("The 'inextricably intertwined' concept does not give a bright line to officers as to what they can do or must avoid . . . ."). As this Court has noted, the ability of police to continue investigating uncharged crimes even after a suspect has been indicted on one offense is critical for effective law enforcement. *See Moulton*, 474 U.S. at 179-80. But the vague and unpredictable fact-based approach to the "closely related" exception would deter such investigations and thereby "unnecessarily frustrate the public's interest in the investigation of criminal activities." *Id.* at 180.

2. A "conduct-based" analysis focusing on the legal elements of the crimes is predictable and workable.

In contrast to the unpredictable and infinitely malleable test based on whether offenses are deemed "factually related," some lower courts have articulated a narrower and more predictable standard. By focusing on the specific conduct that satisfies the elements of the crimes in question, these courts have applied a more workable standard that is by far preferable to the uncertain fact-based test described above.

The Fifth Circuit's decision in *United States v. Cooper*, 949 F.2d 737 (5th Cir. 1991), provides the clearest example. Cooper robbed a convenience store using a sawed-off shotgun. *See id.* at 745. When police located Cooper's car and impounded it, an inventory search uncovered the shotgun in the trunk. Cooper was later arrested, charged with aggravated robbery, and appointed counsel. Six days later a federal agent interviewed Cooper about the shotgun and Cooper admitted

possessing it. Cooper was later charged in federal court with possession of an unregistered firearm. *See id.* at 740-41.

The Fifth Circuit refused to suppress Cooper's statements about the gun on Sixth Amendment grounds because "the federal and state crimes concern different conduct." *Id.* at 744. It did not matter, in the court's view, that the crimes arose from a common set of facts or series of events; to the contrary, the court readily acknowledged that, "efficiently for the governments, both prosecutions could use much of the same evidence." *Id.* The critical factor in the court's analysis was that the elements of the crimes were distinct.

Other courts have similarly pointed to the elements of the offenses at issue as at least part of the basis for distinguishing offenses before them for Sixth Amendment purposes. *See, e.g., Hendricks v. Vasquez*, 974 F.2d 1099, 1104 (9th Cir. 1992) ("Although not wholly unrelated, the two crimes have totally independent elements."). Indeed, in the *Nocella* case described above, the First Circuit effectively relied in large part on a conduct-based test for distinguishing two drug-trafficking crimes as it noted that the crimes "necessitated proof of different elements." 849 F.2d at 38. *Cf. also Hellum v. Warden*, 28 F.3d 903, 909 (8th Cir. 1994) (distinguishing two offenses because the new crime had "distinct elements from the various charges stemming from the events [at] bar").

A test focusing on the conduct that establishes the legal elements of the crimes in question – and, specifically, whether the elements of one are subsumed in the other – is less subject to confusion and manipulation than a vague inquiry into whether the crimes are "factually interwoven." Accordingly, if the Court is inclined to recognize a "closely related" exception to the rule of offense specificity at all, it should adopt this narrow, more predictable "conduct-based" test.

A conduct-based test is also the only articulation of the exception that is even arguably supported by this Court's decision in *Moulton*. In *Moulton*, the incriminating statements obtained afer Moulton's indictment for theft were used to expand the charges against him from theft to burglary. Moulton was then convicted of both burglary and theft. *See State v. Moulton*, 481 A.2d 155, 157 (Me. 1984). Under Maine law, burglary is defined as "enter[ing] or surreptitiously remain[ing] in a structure . . . with the intent to commit a crime therein." Me. Rev. Stat. Ann. tit. 17, § 401 (1983). The elements of the burglary charge in *Moulton* were met with the underlying theft charge combined with breaking into a car dealership. The only exception for closely related offenses suggested by *Moulton*, therefore, applies where one offense constitutes an element of the other.

If a conduct-based test were applied in this case, moreover, respondent's two crimes would *not* be considered "closely related." Under Texas law, burglary and murder are clearly defined by entirely different conduct. *See Fearance v. State*, 771 S.W.2d 486, 493 (Tex. Crim. App. 1988) (en banc) (explaining that burglary is "a property offense" and that burglary thus established "felonious criminal conduct" entirely distinct from an "assault [causing] the death of [the victim]."). As in *Cooper*, much of the same evidence might be used in the prosecution of both crimes. But, also as in *Cooper*, the specific conduct that constitutes each offense is entirely distinct. The offense of burglary was complete when respondent entered the Owings' house with the intent to commit theft. *See* Tex. Penal Code Ann. § 30.02(a)(1). The offense of capital murder involved the entirely separate conduct of killing Margaret and Kori Rae Owings, and specifically it was respondent's conduct in killing two persons that made the crime capital murder. *See* Tex. Penal Code Ann. § 19.03(a)(7). The conduct that constituted the offense of burglary was never used as any

element of the crime of murder with which respondent was charged. Thus, under a conduct-based test for applying the "closely related" exception, respondent's indictment for the burglary would *not* have triggered his Sixth Amendment right to counsel with respect to the murder charge. His conviction, accordingly, should stand, and the good-faith police work that secured his confession should not be frustrated.

III. THE DECISION BELOW CREATES AN UNWORKABLE RULE THAT WILL HOBBLE GOOD-FAITH POLICE EFFORTS TO QUESTION SUSPECTS ABOUT UNSOLVED CRIMES AS TO WHICH NO CHARGES HAVE YET BEEN BROUGHT.

By expansively applying the rule from *Jackson* even to cases where a suspect has not made any affirmative assertion of his right to counsel, and by broadly interpreting the standard for determining whether two offenses are "closely related," the Texas Court of Criminal Appeals created an unworkable rule that will unduly hinder legitimate police efforts to solve crimes.

Under the decision below, even where police have insufficient evidence to charge a suspect with a crime, and even where that suspect has never made any affirmative assertion of his right to counsel, questioning will be barred (absent the presence of counsel) if the unsolved crime is, under some vague standard, deemed "closely factually related" to another crime on which charges have been brought. The rule is especially unworkable when combined – as it was here – with an unwarranted and unrealistically broad presumption that knowledge concerning appointment of counsel for a suspect must be imputed to *all* state actors. The facts in this case aptly illustrate the impossible situation in which the decision places police. The court below presumed that officers in Odessa had the same knowledge about counsel being appointed for

respondent as did the sheriff's office in Walker, Texas – over 500 miles away.

That is simply unrealistic, and will have a significant impact in thwarting routine police investigations and interrogations. Police forces from different local jurisdictions within a State may often participate in investigating the same or related crimes. Whenever a suspect has moved to a new city, for example, or fled from one local jurisdiction to another while released on bail, a different police force may arrest or interrogate a suspect on a new warrant when there has been a break in an unsolved case. Questioning a suspect swiftly to follow up on new leads can often be critical for solving the case. That is particularly true where, as here, the break in the case comes from a confession to a third party months after the crime. Following up on a suspect who is in a frame of mind to confess can often be the *only* way to resolve a case that might otherwise linger unsolved for years. Efforts to secure respondent's confession were thus nothing less than effective and proper police work. As noted above, this Court has consistently recognized that "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426 (citation omitted). The fact that officers in an entirely different jurisdiction knew that respondent had counsel on the distinct charge of burglary provides no sound basis for discarding the fruits of legitimate and good-faith police work.

Under the rule in this case, moreover, it would not be enough for officers in one jurisdiction simply to ascertain the objective facts about proceedings elsewhere – such as whether a suspect has been indicted on the particular charge they were investigating. In this case, for example, officers in Odessa were alerted by respondent's father that respondent had confessed to *murder* and arrested respondent on a warrant for

murder. Respondent had never been indicted for that crime. Yet the holding below was that his Sixth Amendment rights had attached anyway. Under that ruling, law enforcement officers would face an impossible task. Officers in one local jurisdiction would have to investigate scrupulously all the proceedings in another jurisdiction to determine, for example, whether a suspect had been indicted on any crimes, whether counsel had been appointed, and whether the suspect had ever asserted his right to counsel. But that is not all. The officers would then have to act essentially as lawyers to make the subtle determination whether the crime they were investigating was, in some sense, "closely related" to a crime charged elsewhere. It is wholly unrealistic to expect police to play such a role.

The only result of such a rule will be to hobble legitimate and good-faith police work. In this regard, it bears emphasizing that the officers who interviewed respondent handled this case absolutely according to the book. There is not even a hint of police misconduct here, nor even of an error that the officers in Odessa could have avoided. To the contrary, the officers in Odessa fully complied with the requirements of *Miranda* before interviewing respondent. Indeed, they adhered to a procedure under Texas law that is *more* protective than the *Miranda* guidelines and under which they advised respondent of his rights in writing and received a written waiver signed before a witness. *See* Tex. Code Crim. Proc. Ann. art. 38.22, § 2. The expansive rules applied by the Texas Court of Criminal Appeals to suppress respondent's statement were thus particularly unwarranted, because the ordinary procedures that the police used fully protected respondent's constitutional rights under this Court's precedents.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 99-1702

In the Supreme Court of the United States

STATE OF TEXAS,
Petitioner,

v.

RAYMOND LEVI COBB,
Respondent.

On Writ of Certiorari to the
Court of Criminal Appeals of Texas

AMICI CURIAE BRIEF OF TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, FLORIDA PROSECUTING ATTORNEYS ASSOCIATION, INC., NEW MEXICO DISTRICT ATTORNEYS ASSOCIATION, PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION, AND WEST VIRGINIA PROSECUTING ATTORNEYS INSTITUTE, IN SUPPORT OF PETITIONER

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This is a capital case.

QUESTION PRESENTED

When an accused has been indicted for burglary, does his offense-specific Sixth Amendment right to assistance of counsel attach to questioning about subsequent murders when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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STATEMENT OF *AMICI* INTEREST

Both Petitioner and Respondent have consented to the filing of this *amici curiae* brief in support of Petitioner, and letters of consent have been filed with the Clerk simultaneously with this brief.*

The Texas District & County Attorneys Association is an organization which serves its members by producing comprehensive continuing legal education courses for employees in prosecutors' offices, providing technical assistance to the prosecution community and related criminal justice agencies, and serving as a liaison between prosecutors and other organizations involved in the day-to-day administration of criminal justice.

All *amici curiae* joining this brief are similar organizations composed of individuals whose professions involve the investigation and prosecution of criminal activity. As such, the *amici* are acutely interested in the fair and efficient administration of criminal justice. The *amici* believe that this brief will not duplicate those of the parties. Rather, as a broad-based coalition of criminal justice professional organizations, the *amici* believe that they offer a unique perspective on the issues at stake and that such a perspective will be of assistance in the Court's resolution of the case.

The *amici* support the Petitioner's request for relief from the judgment of the Texas Court of Criminal Appeals both because *Cobb* presents an opportunity for this Court to resolve an important constitutional question upon which numerous state and federal

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* This brief has not been authored, in whole or in part, by counsel for a party. With the exception of the printing of this brief, which was performed by the State of Texas, no other person or entity, other than the *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

courts disagree, and because the decision of the Texas court is contrary to the decisions of this Court concerning the attachment of the Sixth Amendment right to counsel and the application of this Court's decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), which protects Sixth Amendment rights by proscribing police-initiated interrogation outside the presence of counsel after an accused has actively invoked his Sixth Amendment right to counsel. The *Cobb* decision especially burdens the members of the *amici* organizations by further confusing an already unsettled body of case law in the federal and state courts applying *Michigan v. Jackson*. This confusion is tangible in Texas due to a split of authority between state and federal courts. The *amici* respectfully ask that this Court provide clear guidance to the law enforcement community concerning the administration of Sixth Amendment rights.

INTRODUCTION

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. CONST. amend. VI. This guarantee applies to the states via the Due Process Clause of the Fourteenth Amendment. *See Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

A criminal defendant's Sixth Amendment right to assistance of counsel attaches upon the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Such proceedings include pretrial proceedings deemed "critical stages," *i.e.*, those at which "the results might well settle the accused's fate and reduce the trial to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967), *see also United States v. Gouveia*, 467 U.S. 180, 189 (1984). Police interrogation occurring after a suspect has been charged with an offense is one such critical stage. *See, e.g., Michigan v. Jackson*,

475 U.S. 625, 629-30 (1986); *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

The Sixth Amendment right to assistance of counsel is offense-specific. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Thus, the Sixth Amendment right to assistance of counsel "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." *McNeil*, 501 U.S. at 175.

The purpose of the Sixth Amendment right to assistance of counsel is to "'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil*, 501 U.S. at 177-78 (quoting *Gouveia*, 467 U.S. at 189). This purpose is distinct from that of the Fifth Amendment "right to counsel," which protects "the suspect's 'desire to deal with the police only through counsel.'" *McNeil*, 501 U.S. at 178 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 (1984)). An invocation of the Sixth Amendment right to assistance of counsel does not constitute an invocation of the Fifth Amendment right. *McNeil*, 501 U.S. at 177-78. The rights to assistance of counsel protected by the Fifth and Sixth Amendments are distinct, protecting entirely different interests. *See McNeil*, 501 U.S. at 178. An individual may invoke the Sixth Amendment right to assistance of counsel as to a charged offense and yet be perfectly willing to speak to police about other possible offenses without the assistance of counsel. *See id.* at 178.

That the Sixth Amendment right to assistance of counsel does not attach until the initiation of formal proceedings against an individual is critical to an understanding of the Sixth Amendment right. *See Gouveia*, 467 U.S. at 189 ("[O]ur conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.'" (quoting *Kirby*, 406 U.S. at 689). The right does not and cannot attach until the instigation of adversarial proceedings because "it is only then

that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Kirby*, 406 U.S. at 689; *see also Gouveia*, 467 U.S. at 189.

When these bedrock Sixth Amendment principles are applied to the facts of this case, it is plain that Cobb's indictment on a *burglary* charge could not lead to the attachment of Sixth Amendment rights with respect to later-filed *capital murder* charges.

The question for the Court to resolve, then, is a simple one: How are multiple "offenses" distinguished from one another for the purposes of applying the "offense-specific" Sixth Amendment right to assistance of counsel?

ARGUMENT

The Texas Court of Criminal Appeals erred by ruling in *Cobb v. State*, No. 72,807, 2000 WL 175644 (Tex. Crim. App. Mar. 15, 2000), that the Sixth Amendment right to counsel for a burglary charge also attaches to subsequent, unrelated murder charges. This ruling frustrates effective law enforcement by its unwarranted, overbroad interpretation of what constitutes an "offense" for the purposes of the Sixth Amendment. Under a proper understanding of the Sixth Amendment right to assistance of counsel, law enforcement officials are not prohibited from continuing to investigate other potential but not-yet-charged offenses, even though the suspect's Sixth Amendment right to assistance of counsel has attached to an unrelated, non-predicate offense.

Thus, Cobb's voluntary confession to the murders of Maggie and Kori Rae Owings fifteen months after his indictment on a burglary charge was properly admissible at his capital murder trial.

I. Separate "Charges" Constitute Separate "Offenses" for the Purposes of the Sixth Amendment.

Separate "charges" constitute separate "offenses" for purposes of determining when the offense-specific Sixth Amendment right to assistance of counsel attaches. In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Court rejected petitioner's proposal that the assertion of the offense-specific Sixth Amendment right to assistance of counsel should imply an assertion of the non-offense-specific Fifth Amendment right to assistance of counsel, noting that the proposed rule, in addition to being of dubious constitutionality, was just bad policy. *See id.* at 180. In so doing, the Court noted that "[t]here is not the remotest chance that [a suspect who wishes to communicate with the police only through an attorney] will feel 'badgered' by their asking to talk to him without counsel present, since the subject will not be the *charge* on which he has already requested counsel's assistance . . . ." *Id.* (emphasis supplied). In other words, the proposed rule would not benefit a suspect who has invoked his Sixth Amendment right to counsel because the Sixth Amendment right attaches only to a particular *offense*, and subsequent interviews by the police as to a different *offense* do not violate the offense-specific Sixth Amendment right to assistance of counsel.

Clarifying that separate charges constitute separate offenses links the definition of "offense" to the essence of the constitutional purpose of the Sixth Amendment right to assistance of counsel. The Sixth Amendment right to assistance of counsel does not attach until the instigation of formal proceedings because "it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Kirby*, 406 U.S. at 689; *see also Gouveia*, 467 U.S. at 189. If the State, in its discretion, elects not to prosecute an individual, the Sixth Amendment right to assistance of counsel does not attach because the State never assumes an adversarial role with

respect to that individual. Consistent with that constitutional purpose, by leaving to the State the authority to define distinct charges (*i.e.*, distinct offenses), the Sixth Amendment accommodates the State's exercise of its discretion to decide whether to prosecute a particular offense. Therefore the Sixth Amendment right to assistance of counsel should not attach to a charge, or offense, that the State has not as yet elected to prosecute.

An expansion of the Sixth Amendment to include a right to assistance of counsel for an as-yet uncharged (and perhaps as-yet uncontemplated) series of crimes, such as those committed by Cobb, would severely undermine the effectiveness of the criminal justice system. By way of example, Cobb went on a crime spree, deciding first to burglarize a house, then deciding to murder a mother, and then deciding to murder a child. The Court should not expand the concept of a single "offense" to encompass such sequential crime sprees.

The rationale employed by the Court to reject the petitioner's proposal in *McNeil* that an invocation of the Sixth Amendment right should constitute an invocation of the Fifth Amendment right to counsel is even more appropriate in the present context:

> [I]f [the Court] were to adopt [petitioner's proposed] rule, most persons in pretrial custody for serious offenses would be unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned. *Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser.* Admissions of guilt resulting from valid *Miranda* waivers are 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'

McNeil, 501 U.S. at 181 (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)) (emphasis supplied). Any definition that expands "offense" beyond "charge" to include crime sprees, be they brief or far-reaching, will certainly reduce the number of uncoerced confessions in unrelated crimes, making society less safe and making the criminal justice system less just.

Indeed, the practical impact of the loss of truthful confessions has been highlighted recently by academics. *See, e.g.*, Paul Cassell, *Protecting the Innocent from False Confessions and Lost Confessions -- and from* Miranda, 88 J. Crim. L. & Criminology 497 (1998). According to Professor Cassell, "[f]alse confessions are a relatively infrequent cause of wrongful convictions. On the other hand, truthful confessions from the true perpetrators of crimes are perhaps the most frequent way in which miscarriages of justice are uncovered." *Id.* at 502. Specifically, Professor Cassell relies on two empirical studies of wrongful convictions that estimate the percentage of uncovered wrongful convictions due to truthful confessions to be 40 percent and 54 percent, respectively. *See id.* at 530-531 (citing Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395, 431 (1987), and Ayre Rattner, Convicting the Innocent: When Justice Goes Wrong, 45-49 & tbl. 8 (1983) (Ph.D. dissertation, Ohio State University) (on file with Univ. Microfilms, Int'l)). At the very least, the *amici* believe this Court should weigh this substantial public benefit against any supposed benefits of an expanded rule.

Specifying that separate charges constitute separate offenses under the Sixth Amendment provides the additional benefit of producing a clear rule for courts, police, prosecutors, and individuals. Law enforcement officials such as those represented by these *amici curiae* and other similarly situated organizations constantly strive to train themselves and others in the law enforcement community about the constitutional boundaries governing their conduct in the course of investigating and

prosecuting crimes. By clarifying that the Sixth Amendment right to counsel attaches only to charged offenses and not to other charges which may or may not be brought in the future, the Court has an opportunity to provide constitutional guidance to the criminal justice community while preserving the societal good of uncoerced, truthful confessions.

II. Because the Sixth Amendment Right to Assistance of Counsel Attaches Only to Specific Charged Offenses, Cobb's Burglary-Related Sixth Amendment Rights Were Not Violated When He Was Questioned About Murder Charges.

In light of the fact that only burglary charges had been brought against Cobb when he allegedly invoked a Sixth Amendment right to assistance of counsel, the Odessa police did not violate Cobb's Sixth Amendment right to counsel by interrogating him later about the murders of Maggie and Kori Rae Owings.

In his initial meeting with police, after a complete and thorough reading of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), Cobb waived his Fifth Amendment right to communicate with police through counsel, electing instead to confess to the burglary of the Owings home. Despite confessing the burglary, Cobb denied any connection to the disappearance of Maggie and Kori Rae.

The State then commenced formal proceedings against Cobb, arraigning him on the charge of burglary. The court appointed counsel for Cobb at the arraignment. Even assuming that Cobb invoked his Sixth Amendment right to assistance of counsel by passively accepting the appointment of counsel as to the burglary charge (a point which *amici* have not briefed, but which they do not concede), it absolutely does not follow that the Sixth Amendment right to assistance of counsel attached to any possible future charge against Cobb arising from the disappearance of Maggie and Kori

Rae (as opposed to the disappearance of the *belongings* of Maggie and Kori Rae). Based on Cobb's denial of any involvement in Maggie's and Kori Rae's disappearance and the lack of direct evidence linking Cobb to the disappearance, the State did not charge Cobb with any offense relating to their disappearance. Consequently, the adversarial relationship between Cobb and the prosecution had not solidified with respect to other offenses, such as murder, which might be charged at a later date based on further investigation of the disappearance. Thus, the Sixth Amendment right to assistance of counsel was in no way implicated as to the future murder charge.

Fifteen months after his voluntary confession to burglary, Cobb revealed to his father that he murdered Maggie and Kori Rae. After Cobb's father called the police, Odessa police officers promptly took Cobb into custody to question him about his involvement in the disappearances. The Odessa police read Cobb his *Miranda* rights, and they confirmed that Cobb understood his rights, including his Fifth Amendment right to communicate with police only through counsel. Cobb knowingly and intelligently waived those rights and then confessed to the police that he killed Maggie and Kori Rae. Based on Cobb's confession, the State commenced formal proceedings against Cobb, charging him with the murders of Maggie and Kori Rae Owings. Cobb's Sixth Amendment right to assistance of counsel with respect to the murder charges did not attach until some time after the police received a tip from Cobb's father and then renewed their murder investigation. Because Cobb confessed to the murders without ever invoking his Sixth Amendment right to the assistance of counsel with respect to the murder charges, the State properly introduced the evidence gathered from that confession in prosecuting Cobb for the murders of Maggie and Kori Rae.

III. The *Blockburger* Test for Distinguishing Between Offenses Allows Offense-Specific Sixth Amendment Rights to Co-Exist with Prosecutorial Discretion.

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court laid out an elements test which outlined the scope of the constitutional meaning of "offense," and that standard provides an additional restraint to ensure that the State does not abuse its discretion to make charging decisions in order to circumvent the Sixth Amendment right to assistance of counsel.

Blockburger concerned the constitutional scope of "offense" in the Fifth Amendment double jeopardy context. In analyzing the issue of double jeopardy, which protects an individual from being prosecuted twice for substantially the same offense, the Court was called to define the precise scope of "offense" as used in the Constitution. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb." (emphasis supplied)); *Blockburger*, 284 U.S. at 301. Like the Fifth Amendment's double jeopardy prohibition, the effect of the offense-specific Sixth Amendment turns on the precise constitutional meaning of "offense," and the Court should import *Blockburger*'s framework for distinguishing separate offenses in order to provide clear guidance for the similar inquiry in the Sixth Amendment context.

Addressing whether separate charges arising out of the same drug sale under the Narcotics Act violated Fifth Amendment double jeopardy, the Court held in *Blockburger* that such charges constituted different offenses because each charge "required proof of a different element." *Blockburger*, 284 U.S. at 304. In fashioning this elements test for determining the constitutional meaning of offense, the Court responded to a legitimate concern that the government might create nominally distinct but substantively identical charges which would enable it to continue prosecuting for the same "offense" until obtaining a successful

conviction. The elements test provides a familiar and time-tested safeguard precisely to prevent against such abuse.

Blockburger's constitutional understanding of "offense" provides a similar protection to the offense-specific Sixth Amendment right to protection of counsel. Under the charge test, the State properly exercises discretion when deciding whether to prosecute a particular offense. The *Blockburger* delineation of the constitutional meaning of "offense" circumscribes that discretion by ensuring that the State cannot create nominally distinct but elementally identical charges in order to circumvent an individual's Sixth Amendment right to assistance of counsel. *Cf. Maine v. Moulton*, 474 U.S. 159, 176 ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."). With the *Blockburger* protection in place, the State could not create two different charges with identical elements, charge an individual with the first (to which the right to assistance of counsel would attach), interrogate afterwards in the absence of counsel (but after issuing the *Miranda* warnings), and then use any incriminating information to prosecute the second charge.

The charge test, when understood in the constitutional framework laid out by *Blockburger*, thus provides a definition of "offense" in the context of applying the Sixth Amendment right to assistance of counsel that is consistent with the purpose of the Sixth Amendment and fully protects the interests of the individual. This multifaceted test checks the State's discretion to create charges and interrogate suspects, while simultaneously promoting society's interest in encouraging uncoerced confessions. Individuals need not fear that the State will be able to deprive them of the constitutionally guaranteed right to assistance of counsel with respect to a charged offense once they have asserted that right and the adversarial positions of the State and the individual have

solidified. At the same time, the State may continue to investigate and discuss matters involving other possible offenses without forcing the individual to take an adversarial stance to the state in all discussions, which is without doubt an "unmitigated good." *McNeil*, 501 U.S. at 181.

In Cobb's case, the murder and burglary charges are constitutionally distinct offenses under *Blockburger* because they involve different elements. In Texas, burglary involves breaking and entering into a personal dwelling with felonious intent (usually theft). *See* TEX. PEN. CODE ANN. § 30.02 (Vernon 1994). Murder involves the taking of human life and does not require breaking and entering. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). In short, burglary and murder are *not* the same offense, and under the established and familiar precedents of this Court, there are grounds for distinguishing Cobb's charged offenses and the attachment of the Sixth Amendment right to assistance of counsel with respect to those separate offenses.

IV. Under an Alternative "Very Closely Related" Factual Similarity Standard, Cobb's Sixth Amendment Right To Assistance of Counsel Was Not Violated.

Several federal circuits have developed a factual similarity test to determine whether a second criminal act is sufficiently "closely related" to the first such that they constitute the same offense. Under this standard, the Sixth Amendment right to assistance of counsel is considered to attach to the second act when it attaches to the first. *See, e.g., Whittlesey v. State*, 665 A.2d 223, 224, 235 (Md. 1995) ("The unifying theme among the Sixth Amendment cases has been that the right to counsel carries over only to new charges arising from 'the same acts on which the [pending] charges were based.'" (quoting *United States v. Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988) (surveying the approaches employed by courts to determine whether two criminal acts constitute the same offense for purposes of the attachment of the Sixth Amendment right to

counsel))). Under such an approach, courts look for "identity of time, place, and conduct," *Whittlesey*, 665 A.2d at 235, and occasionally identity of parties, *see, e.g., United States v. Hines*, 963 F.2d 255, 257-58 (9th Cir. 1992), to determine whether a second criminal act is sufficiently closely related to a first to merit Sixth Amendment right to counsel protection at the time the right attaches to the first criminal act. *See Whittlesey*, 665 A.2d at 235.

Courts applying this standard have followed two general approaches in deciding how strictly to interpret "closely related" in the Sixth Amendment context. *See id.* at 234. One line of cases has construed "closely related" more broadly where there is evidence of deliberate police misconduct. *See id.* at 234-35. In cases in which there is no evidence of police misconduct, however, courts have defined "closely related" very narrowly, requiring, for example, that the two criminal acts be "inextricably intertwined." *See id.* at 235 (quoting *United States v. Cooper*, 949 F.2d 737, 743 (5th Cir. 1991)).

Should the Court adopt the "closely-related offense" standard, it should apply the more stringent "inextricably intertwined" test to determine that the Odessa police did not violate Cobb's Sixth Amendment right to assistance of counsel by interrogating him regarding the murders after counsel attached for the burglary charge. *See Whittlesey*, 665 A.2d at 234-35 (when there is no "evidence of deliberate police misconduct," the court considers "whether this case falls within the second line of cases . . . [which] focus entirely on whether the facts underlying charged and uncharged offenses are 'closely related,' 'inextricably intertwined,' or 'inextricably enmeshed'" (citations omitted)). There is absolutely no evidence of deliberate misconduct by the Odessa police. The officers did not know that Cobb had counsel, or even that he had been arraigned, on a prior burglary charge; they only sought to respond as they best saw fit to a cold call offering information about an unsolved murder. The Odessa police followed

all proper procedures, carefully explaining to Cobb his rights under *Miranda* and obtaining from him a written waiver. By initialing the written waiver form, Cobb confirmed that he knowingly and intelligently waived each Fifth Amendment right available to him, including his right to communicate with police only through an attorney. Only after carefully securing Cobb's written waiver did the Odessa officers begin to discuss the murders, to which Cobb readily confessed.

Under the "very closely related" test, the Odessa police did not violate Cobb's Sixth Amendment right to counsel because the murder charges are sufficiently distinct from the burglary charge. Specifically, the murders and the burglary differed in conduct, time, place and identity of the parties involved.

The murders and the burglary committed by Cobb involved conduct so different that to lump those acts under a common umbrella of "offense" would render that term meaningless. Cobb's burglary involved breaking and entering a dwelling that may or may not have been occupied. It involved the desire at the time of illegal entry to commit theft or some other felony. On the other hand, Cobb's murder of Maggie Owings involved the brutal slaying of another individual. Cobb's subsequent murder of Kori Rae Owings involved the wanton disregard of a helpless child's life. Cobb's burglary quite simply was *not* part of the same physical act or series of acts as the two subsequent murders.

Moreover, the State classifies murder and burglary as distinct offenses because the acts represent different harms to society. *Cf. Blockburger*, 284 U.S. at 303-304 (holding that two separate provisions of the Narcotics Acts created two distinct offenses because each was designed to protect a particular interest, notwithstanding that petitioner violated both during the "same" drug sale). The statutory offense of burglary is designed to protect the interests of owners in the security of habitations and buildings. *See, e.g., Day v. State*, 534 S.W.2d 681 (Tex. Crim. App. 1976). In

contrast, the murder statute is designed to protect the sanctity of life.

Cobb committed the murders later in time and subsequent to the burglary, and the definition of a single "offense" should not include a common "crime spree," contingent only on duration. Cobb's murderous acts took place after the burglary was complete. In Texas, burglary is statutorily defined as the illegal entry on private premises with felonious intent, *see* TEX. PEN. CODE ANN. § 30.02 (Vernon 1994), in which case the offense of burglary is complete at the time of entry. Even under an alternate statutory definition of burglary as the commission of a felony while located on the premises after illegal entry, *see id.*, at least one of the murders committed by Cobb took place after he left the premises, in which case the burglary was once again complete prior to that murder. Cobb murdered Maggie Owings after entering the premises with the intent to steal, and he murdered Kori Rae Owings after completing the burglary, however defined.

That the murders happened shortly after the burglary was complete is irrelevant. *Cf. Blockburger*, 284 U.S. at 301-02 (rejecting as "unsound" petitioner's argument that the payment for a second quantity of drugs shortly after the delivery of the first quantity constituted one "continuing offense"). This Court held in *Blockburger* that "[e]ach of several successive sales constitutes a distinct offense, however closely they may follow each other." *Id.* The Sixth Amendment should not provide additional protection to an individual merely because he engages in a brief crime spree rather than in a more extended one. *Cf. id.* at 302 ("'If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.'" (quoting *Wharton's Criminal Law* § 34 (11th ed.))).

Finally, the links between the burglary and the murders formed by the place of the crime and the identity of the parties involved are tenuous at best. Cobb committed the burglary at the Owings home.

He killed Kori Rae more than a mile away, burying her alive at the site where he dumped Maggie's body. Moreover, Cobb is the only party common to the three criminal acts. Burglary does not depend on the presence of anyone in the home; Cobb could have been just as guilty of burglary if neither Maggie nor Kori Rae had been home the day Cobb entered the premises with felonious intent. In that sense, neither the presence of Maggie nor Kori Rae was a necessary element to Cobb's burglary of the Owings home. Maggie and Kori Rae were essential, however, to the murders. Making the identity-of-the-parties inquiry hinge solely on whether there is a common perpetrator would once again reduce "offense" to nothing more than "crime spree," a constitutionally unacceptable result.

Thus, Cobb's murders differed from the burglary in time, place, conduct and identity of the parties involved. Under the factual "very closely related" test embraced by several circuits and based on these factors, *see, e.g.*, *United States v. Covarrubias*, 179 F.3d 1219, 1223, 1225 (9th Cir. 1999), the Sixth Amendment right to assistance of counsel never attached to the gruesome murders simply because Cobb committed a completely different offense of burglary beforehand. The Texas Court of Criminal Appeals erred by concluding otherwise.

V. Conclusion.

The Court in *McNeil* made clear that the purpose of the offense-specific Sixth Amendment counsel guarantee is to protect the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse positions of government and defendant have solidified with respect to a particular alleged crime. *See McNeil*, 501 U.S. at 177-78. The adverse positions of Cobb and the State of Texas did not solidify with respect to the Owings murders until after the police learned of Cobb's confession. Accordingly, Cobb's Sixth Amendment rights respecting those charges did not arise until Cobb's indictment on capital murder charges. By that time, Cobb had already confessed the murders to

the police. As a result, Cobb's confession was properly used to secure his conviction for two counts of capital murder and that conviction should not have been reversed by the Texas Court of Criminal Appeals on Sixth Amendment grounds.

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In the Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF 21 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Capital Case

QUESTION PRESENTED

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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INTEREST OF THE *AMICI* STATES

The State of Ohio and 20 other *amici* States write to urge the Court to reverse the judgment of the Texas Court of Criminal Appeals in this case. At stake is the scope of the Sixth Amendment right to counsel where one suspect has committed two distinct – although temporally related – crimes. Some lower courts, including the court below, have misinterpreted this Court's holding in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), by overlooking the "offense specific" nature of the Sixth Amendment. Just because a suspect's right to counsel has attached in connection with one of his crimes, the Sixth Amendment does not bar the police from inquiring about all others.

Two vital societal interests of importance to the States are at issue here: (1) the States' prerogative to investigate crime and convict the guilty and (2) the States' (sometimes countervailing) interest in protecting their citizens from police circumvention of constitutional rights. These concerns are of particular moment where, as here, one person is accused of two factually related but legally distinct offenses. When can an accused effectively and voluntarily waive his right to counsel with respect to a particular offense after earlier accepting the appointment of counsel for another criminal charge? Where a properly Mirandized suspect is willing to talk about Crime A, are police forever barred from questioning him about it simply because a court has already appointed counsel for that suspect concerning Crime B?

The way in which the Texas Court of Criminal Appeals answered those questions – barring police interrogation even where a willing and well-informed suspect wants to answer questions – is not compelled by the Sixth Amendment, and would significantly hinder the States' ability to effectively investigate crime, while giving little benefit to accused persons beyond the protections already

properly available to them under *Miranda v. Arizona*, 384 U.S. 436 (1966). We therefore urge the Court to reverse the judgment below.

SUMMARY OF ARGUMENT

We address in this brief only the second question in the petition, and that question boils down to this: Once a state trial court had appointed counsel for respondent Cobb on a burglary charge, could Cobb, without consulting that attorney, knowingly and intelligently agree to police questioning about two unsolved murders? The Texas Court of Criminal Appeals said "no," finding that Cobb's Sixth Amendment right to counsel had attached on the murder investigation once Cobb was arraigned on the burglary charge. Because that judgment is inconsistent with this Court's Sixth Amendment jurisprudence, and because the appellate court's approach would frustrate both the legitimate interests of law enforcement and the express wishes of properly-Mirandized criminal suspects, that judgment should now be reversed.

The Court's Sixth Amendment decisions of the past three decades point toward a different outcome than the one reached by the court of appeals in this case. While a suspect who has been arraigned and who has not agreed to waive his *Miranda* rights may not be questioned, *see Brewer v. Williams*, 430 U.S. 387 (1977), and though police may not secure admissions by secretly recording a defendant's conversations after he has secured counsel, *see Maine v. Moulton*, 474 U.S. 159 (1985), this case involves no similar end-run around the Sixth Amendment by the police.

If, as the Court has said, the right to counsel under the Sixth Amendment is "offense specific," *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991), Cobb's knowing consent to police questioning about an offense with which he had not yet been

charged, and for which he certainly did not have counsel, was proper. The interrogation in this case violated neither the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring the police to provide specific warnings to suspects in custody before questioning them), nor the Court's more recent holding in *Michigan v. Jackson*, 475 U.S. 625 (1986) (barring police-initiated interrogation about a criminal charge once the defendant has been appointed counsel for that charge).

But precedent alone cannot resolve this case, of course, and the "closely related" test – an easily-named but hard-to-apply test that lower courts have developed for determining whether a defendant's lawyer for one criminal charge should be considered his lawyer for a related offense – has created uncertainty in cases like this. The "closely related" test is fact-intensive, and it has led to uneven results in the lower courts. If, as *McNeil* suggests, police may question a suspect about one offense even if that suspect already has counsel for some other offense, a clearer test is needed so that police and prosecutors can know whether they may question any given suspect, and if so, what issues they may explore with him.

In place of the "closely related" test, we offer a so-called "knowing circumvention" test. Under this latter bright-line test, police could question a suspect about a new offense as long as they did not intentionally undercut the suspect's right to counsel, as happened in *Brewer*, *Moulton*, and *Jackson*. Such a test holds true to the limits on police overreaching set by those cases, even as it permits police to question a properly-Mirandized suspect about new crimes with which he has not yet been charged. Under the "knowing circumvention" approach, the police in this case properly secured respondent Cobb's knowing consent to talk with them about two murders, even though he already had counsel for a pending burglary charge.

Finally, even if the Court adopts the "closely related" test as the proper approach in cases like this, the lower court misapplied that test to these facts. The pending burglary charge against respondent Cobb was factually distinct from the murders to which he confessed during police questioning, so the judgment vacating Cobb's convictions should be reversed even if the "closely related" analysis is the proper one for this case.

ARGUMENT

At issue here is the scope of the Sixth Amendment right to counsel where one suspect is implicated in two offenses. Respondent Cobb voluntarily confessed to two counts of capital murder after law enforcement officers fully explained his *Miranda* rights to him. However, because counsel had already been appointed for Cobb on a related burglary charge (unbeknownst to the officers to whom he confessed in another county), and because the interrogating officers failed to secure the attorney's permission before questioning Cobb about the murders, Cobb's confessions were thrown out and his convictions vacated.

The court of appeals did so even though the murder charges were in no way predicated on the burglary offense. Neither Texas law nor the record disclose any element of the murder offenses that would also constitute an element of the previously-charged burglary offense (save the venue and date), and likewise, no element of the burglary offense overlaps with the essential elements of the murder charges. While the murders occurred during a sequence of events starting with Cobb's burglary of a home, those murders remain factually and legally distinct from that first offense.

A. This Court's Cases Bar Police From "Knowingly Circumventing" The Accused's Right To Counsel.

All can agree that once a suspect's Sixth Amendment right to counsel has attached and been invoked, the police may not initiate an interrogation of him about a crime without first securing the permission of his lawyer. *See Brewer v. Williams*, 430 U.S. 387 (1977); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988). However, that right to counsel attaches only when adversary judicial proceedings have been initiated, either "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). And because the Sixth Amendment is "offense specific," it "cannot be invoked once for all future prosecutions." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

When a suspect makes voluntary "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached," those statements "are, of course, admissible at a trial of those offenses." *Maine v. Moulton*, 474 U.S. 159, 180 n.16 (1985). The reason for such a rule is plain, for "[t]he police have an interest . . . in investigating new or additional crimes [perhaps committed by] individuals already under indictment." *Id.* at 179. Any rule extending a Sixth Amendment right to counsel to every possible activity committed by someone against whom a criminal charge is already pending "would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Id.* at 180.

In this case, the trial court's appointment of counsel for Cobb at his arraignment on the burglary charge was limited to that charge alone, not to other offenses that he may have committed. The Texas Court of Criminal Appeals should have so held, thereby preserving the law enforcement

officers' authority to investigate other crimes apart from the burglary, and allowing them to interview Cobb about other crimes if he knowingly and intelligently agreed to speak with them.

Instead, the court below applied a lawyer-for-one/lawyer-for-all approach to the additional criminal charges for which Cobb later became a suspect. The court cited what it described as a "Sixth Amendment rule that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is *very closely related factually* to the offense charged." Pet. App. at A-6 (emphasis added). In deciding whether the burglary charge and two capital murder offenses involving separate conduct and completely different elements constituted "very closely related" offenses, the Texas court observed only that the murders were "factually interwoven" with the burglary. Pet App. at A-7.

The Texas court's error stems in part from analysis developed by lower courts before this Court's decision in *McNeil*. Those earlier decisions in turn rested on this Court's decisions in *Brewer* and *Moulton*. In *Brewer*, the suspect incriminated himself when the police – who had promised the suspect's lawyer that they would not question the suspect – prompted him to talk while riding in a police cruiser after his arraignment. That defendant already had a lawyer for a pending abduction charge, and he never agreed to waive his *Miranda* rights before talking with the police in the car. The Court found his incriminating words and actions inadmissible in a related murder case. In *Moulton*, police obtained admissions by surreptitiously recording a defendant's conversations with a co-defendant after the defendant had been charged with theft and after a lawyer had been appointed for him. Again, this Court set aside the admissions and resulting convictions, holding that the police had violated the defendant's Sixth Amendment right to counsel.

The *Brewer* and *Moulton* cases together bar the government from obtaining incriminating statements by "knowingly circumventing" the accused's right to have counsel present during custodial interrogation. *Moulton*, 474 U.S. at 176. And likewise, in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court faulted police officers for interrogating "an uncounseled prisoner who ha[d] asked for the help of a lawyer." *Id.* at 631 (holding that where police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid). While the Court's holding in *Jackson* does not address a situation like the one here, where the interrogation concerned new crimes for which no charges were yet pending, we see as critically important in *Brewer*, *Moulton* and *Jackson* the obligation of law enforcement officers to refrain from interrogation about any particular crime once the right to counsel has attached to it.

Still, nothing in those cases bars the police from doing just what they did here: asking a suspect if he is willing to waive his *Miranda* rights and speak with them about new offenses distinct from those with which he has already been charged. Honest and thorough police work ought to be encouraged in that situation, and willing and intelligent suspects ought to be free to make the knowing and voluntary choice that respondent Cobb made in this case.

B. The "Inextricably Intertwined" Or "Closely Related" Test Employed By The Lower Court Lacks A Principled Basis In The Sixth Amendment.

In an effort to reconcile the limits on police interrogation described in *Brewer*, *Moulton*, and *Jackson* with the "offense specific" nature of the Sixth Amendment

described in *McNeil*, several state and federal courts weighing the Sixth Amendment rights of defendants facing multiple criminal charges have developed the "inextricably intertwined" or "closely related" test. Under that approach, when two offenses seem closely tied on the facts, courts have tended to find that a lawyer who represents a defendant for his role in one offense also automatically represents him for any possible related cases, even though *McNeil* describes the Sixth Amendment as offense-specific. *See, e.g., United States v. Arnold*, 106 F.3d 37, 40-41 (3d Cir. 1997); *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993), *cert. denied*, 511 U.S. 1059 (1994); *United States v. Doherty*, 126 F.3d 769, 776 (6th Cir. 1997), *cert. denied*, 524 U.S. 917 (1998); *United States v. Hines*, 963 F.2d 255, 257-58 (9th Cir. 1992); *People v. Clankie*, 530 N.E.2d 448, 451-52 (Ill. 1988); *Whittlesey v. State*, 665 A.2d 223, 233-36 (Md. 1995), *cert. denied*, 516 U.S. 1148 (1996).

The majority of these cases focus "entirely on whether the facts underlying the charged and uncharged offenses are either 'closely related' or 'inextricably intertwined[.]'" *Arnold*, 106 F.3d at 41. As the Third Circuit has said, courts have tried to determine "whether the same acts and factual predicates underlie both the pending and the new charges," *id.*, and whether the uncharged and charged offenses "arose from the same predicate facts, conduct, intent and circumstances." *Id.* at 42.

This Court has never determined whether this post-*McNeil* melding of legal representation for related offenses (and the resulting ban on police interrogation for the second offense, even where the accused knowingly and voluntarily wishes to speak with the authorities) is compelled by the Sixth Amendment. As one lower court has said, the "'precise boundaries' of the '"offense-specific" limitation' have yet to be 'flesh[ed] out.'" *People v. Clair*, 828 P.2d 705, 721 (Cal.

1992) (quoting *McNeil*, 501 U.S. at 187 (Stevens, J., dissenting)), *cert. denied*, 506 U.S. 1063 (1993).

Unfortunately, this uncertainty has led to a result that does not advance the States' interest in protecting citizens from police overreaching (for here, the defendant knowingly and intelligently agreed to speak with the police about the murders even though – unbeknownst to them – he already had a lawyer on his separate burglary charge), and surely frustrates Texas's interest in punishing a murderer (for the judgment below tossed out Cobb's confession and convictions). That outcome cannot be reconciled with *McNeil*'s requirement that the prophylactic -Sixth Amendment protection articulated in *Jackson* be applied only on an "offense specific" basis.

C. A "Knowing Circumvention" Test Offers Clearer Guidance For Police, While Preserving The Important Interests Advanced By The Sixth Amendment.

Rather than wrestling with the "closely related" test for deciding whether the right to counsel has attached to any of several pending or potential criminal charges, courts ought to look instead for any knowing circumvention of a suspect's right to counsel. Absent that, police should be free to speak with a properly-Mirandized suspect about offenses with which he has not been charged, and for which he has not yet sought counsel. Several lower courts have already applied such a test. *See, e.g., United States v. Nocella*, 849 F.2d 33, 36-37 (1st Cir. 1988); *United States v. Martinez*, 972 F.2d 1100, 1105-06 (9th Cir. 1992); *United States v. Mitcheltree*, 940 F.2d 1329, 1339,1342-43 (10th Cir. 1991). The *amici* States now urge this Court to likewise adopt that test, and to apply it to these facts.

The Court has "repeatedly emphasized the virtues of a bright-line rule" in interrogation cases. *Roberson*, 486 U.S. at 681. *See also Jackson*, 475 U.S. at 634; *Minnick*, 498 U.S. at 151; *Smith v. Illinois*, 469 U.S. 91, 98 (1984); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). The "inextricably intertwined" or "closely related" concept fails to give police officers the kind of bright line they want and need. Under that test, they are left to guess whether a court will later find that two distinct crimes – like the burglary and murder offenses committed by respondent Cobb – are so similar that the lawyer for the first charge should be treated as the lawyer for any possible later charges.

Under a knowing circumvention test, officers could interrogate a properly-Mirandized suspect about a new as-yet-uncharged crime unless they knowingly tried to undercut or circumvent his Sixth Amendment rights. Not only does such a test address the sometimes-competing interests of thorough police work on the one hand, and protection of accused persons from police overreaching on the other, but that test also reinforces the Court's holdings in *Brewer*, *Moulton* and *Jackson* while preserving *McNeil*'s "offense specific" view of the Sixth Amendment right to counsel. This knowing circumvention test would apply whenever the police breach their "affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel," *Moulton*, 474 U.S. at 171, while still allowing willing suspects to waive their *Miranda* rights and talk about crimes for which they do not yet have legal representation.

Additionally, language in *Moulton* supports this view. In that case, the Court held that the government violated the defendant's Sixth Amendment right to counsel by interrogating him post-indictment without counsel, even though this interrogation was part of a legitimate investigation of "new" crimes. *Id.* at 176-80. However, the

Court held only that the government may not elicit from, and ultimately use against, the defendant "incriminating statements pertaining to pending charges" if in obtaining the evidence the government "knowingly circumvent[s]" the defendant's right to counsel. *Id.* at 180. Thus, the Court held that knowing exploitations by the State of the opportunity to confront the accused outside the presence of counsel violates the Sixth Amendment. *See id.* at 176. In *Moulton*, the Court found a knowing circumvention of the accused's Sixth Amendment rights because the incriminating conversation was recorded by an undercover informant working as an agent of the government. However, the Court further noted that the right to counsel is not violated when the State obtains incriminating evidence by luck or happenstance after judicial proceedings have commenced. *Id.* at 176.

Similarly, in *Brewer*, this Court held that an arraigned defendant's incriminating statements were inadmissible at trial because the officer's speech about giving the victim a "Christian burial" was tantamount to interrogation. Again, under a "knowing-circumvention" analysis, the officer's conduct in *Brewer* violated the defendant's Sixth Amendment right to counsel because the police surreptitiously elicited information after adversary proceedings had begun. *Id.* at 399-401.

However, there is no reason why either *Brewer* or *Moulton* should compel exclusion of the confession here, for neither of those cases involved an admittedly voluntary confession by a suspect who had explicitly waived his *Miranda* rights and agreed to speak with the authorities about an offense different from the one on which he had been arraigned with counsel. In this case, there is no evidence that the police knowingly circumvented Cobb's Sixth Amendment rights. To the contrary, the record demonstrates that the officers informed Cobb of his *Miranda* rights, and he then knowingly and voluntarily waived them. Furthermore,

the police who questioned Cobb did not know that he had counsel on the related burglary charge. In short, there is no evidence that the police attempted to circumvent Cobb's Sixth Amendment rights, knowingly or otherwise. Excluding Cobb's confession only frustrates Cobb's own wishes, and penalizes the police for actions that were both reasonable and fair. Under a "knowing circumvention" test, the police validly secured a knowing and voluntary confession from Cobb, and that confession was properly admitted at his trial.

D. Even If The Court Adopts The "Closely Related" Test, The Facts Of This Case Support Reversal Of The Judgment Below.

Even if the Court does not adopt the "knowing circumvention" test, it should still reverse the Texas Court of Criminal Appeals because that court applied an inappropriately broad interpretation of the "closely related" test in this case. The existing offense-specific rule of *Jackson* and *McNeil*, operating in conjunction with the Fifth Amendment principles of *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), is fully adequate to protect criminal suspects. The record here demonstrates as much: respondent Cobb, though fully apprised of his right to remain silent, opted to speak with the authorities about murders that he had committed nearly two years earlier. Just because he had confessed to a related burglary some seven months after committing both crimes, and though the trial court had appointed counsel for Cobb on that burglary charge, Cobb remained free to voluntarily speak with authorities about other crimes. No compelling interest of either criminal defendants or the States is served by a rule that bars the police from interrogating a suspect in this situation. The contrary decision of the court below now merits reversal.

Here, the burglary and murder offenses differed, and certainly neither charge was a lesser-included offense of the

other. The rule established by the court below does not address the very problem that the "closely related" test was designed to cure: police officers' ability to "circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes." *Arnold*, 106 F.3d at 41 (quoting *In re Pack*, 616 A.2d 1006, 1011 (Pa. Super. 1992), *appeal denied*, 634 A.2d 1117 (Pa. 1993)). In this case, respondent Cobb knowingly and voluntarily waived his *Miranda* rights and confessed to the murders. The police neither forced him to confess against his will, nor tricked him into talking about the crime for which he already had counsel. Thus the application of the "closely related" test by the lower court failed to accomplish the very purposes of that test.

Additionally, the Texas appellate court's broad reading of the Sixth Amendment right to counsel runs counter to the reasoning of *Moulton* and *McNeil*, which emphasized both the narrow application of the Sixth Amendment right to counsel and the importance of allowing police to initiate and pursue investigations. Accordingly, even if the Court adopts the "closely related" test, it should nonetheless overturn the judgment below, because the offenses in this case did not overlap factually or legally.

CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Criminal Appeals should be reversed.

Respectfully submitted,

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No. 99-1702

IN THE

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

vs.

RAYMOND LEVI COBB,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan* v. *Jackson*, 475 U. S. 625 (1986), and *Patterson* v. *Illinois*, 487 U. S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

2. When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine* v. *Moulton*, 474 U. S. 159 (1985), and *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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IN THE

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

vs.

RAYMOND LEVI COBB,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case raises key issues concerning the police's ability to continue to investigate a suspect's additional criminal conduct after that person is charged with one crime. The Texas

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Court of Criminal Appeals has given a very expansive reading of the confusing term "closely related," improperly allowing the right to counsel to extend to uncharged crimes. It has made this decision without regard to the interrogation's minimal effect on the representation of counsel for the charged crime, with only some simple factual relation to the previously charged crime. This hostility to interrogations needlessly hampers legitimate police investigation, depriving courts and juries of voluntary, highly probative confessions. The Texas court's needless limits on good police work is contrary to the rights of victims and society which CJLF was formed to serve.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Texas Court of Criminal Appeals and the trial judge's findings on the suppression motion. On December 27, 1993, defendant burglarized the residence of Lindsey and Margaret Owings in Walker County, Texas. App. to Pet. for Cert A-3. He stole a stereo system, videocassette recorder, and other things. *Ibid.* Defendant then intentionally killed 22-year-old Margaret Owings and 16-month-old Kori Rae Owings. *Ibid.* He stabbed Margaret in the home and buried her in the woods some two to three hundred yards from the home. *Id.*, at A-9 (McCormick, P. J., dissenting). He also took Kori and buried her alive with her mother. *Id.*, at A-9 to A-10.

Cobb confessed to the burglary in July, 1994. *Id.*, at A-4. The validity of this confession is not challenged. He was indicted for burglary and was appointed counsel. *Ibid.* "Appellant made bond in the burglary case and moved to another town [Odessa]." *Id.*, at A-10 (dissent).

Over a year later, while the burglary case was still pending, Cobb confessed the murder to his father, who then told the police. The Odessa police administered the *Miranda* warnings, as did the magistrate. *Id.*, at D-3 and D-7 (trial court findings 8 and 24). Cobb understood and waived his rights "and

voluntarily took officers to the area where the remains of Margaret Owings and the clothing of Kori Rae Owings were found." *Id.*, at D-3 (finding 8).

Defendant was convicted of intentionally killing two people in a single criminal transaction and was sentenced to death. *Id.*, at A-1. The burglary was originally included in the murder indictment, but that allegation was abandoned before trial. *Id.*, at D-4 (findings 10 and 13). The Texas Court of Criminal Appeals reversed the conviction, holding that the Odessa interrogation violated defendant's Sixth Amendment right to counsel, as the murders were "factually interwoven with the burglary" charge, to which his right to counsel had attached. See *id.*, at A-7 to A-8.

SUMMARY OF ARGUMENT

This case is largely resolved by asking the proper question. The issue in this case is not whether there is an "exception" to the offense specificity of the Sixth Amendment, but rather what is the scope of the rule of exclusion of evidence obtained in violation of the Sixth Amendment.

The basic Sixth Amendment rule, as established in *Massiah* v. *United States*, 377 U. S. 201 (1964) and *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), is that once a person has been charged and asks for representation, the police may not question that person with regard to the charged offense without the consent of counsel. Questioning related to uncharged offenses, however, is acceptable. This clear rule should not be obscured by the largely unexplained results in *Maine* v. *Moulton*, 474 U. S. 159 (1985) and *Brewer* v. *Williams*, 430 U. S. 387 (1977).

A close reading of *Moulton* dispels any notion that it supports an exception to the Sixth Amendment rule. That decision never mentions any Sixth Amendment exception, but instead consistently ties the right to counsel to the charged offenses. The analysis centered on the state's purpose behind

its post-indictment investigation and whether the investigation constituted impermissible interrogation of the defendant. These points also formed the bulk of the argument in the briefs of both Maine and the United States in *Moulton*. Neither brief argued to separate the uncharged burglary offense from the charged offenses that had been reversed by the Maine Supreme Court. *Moulton*'s unargued, unanalyzed reversal of the uncharged burglary is not precedent for a Sixth Amendment exception.

Nor should *Brewer* v. *Williams* support the exception. As in *Moulton*, the analysis centered on another issue, waiver. Once again, the Court did not discuss any exception to the general rule. The result in this case is best explained by a rule that if material evidence is obtained in violation of *Massiah* with regard to a pending charge, that evidence is not admissible at the trial of the pending charge or of any charges that may be brought later.

This explanation brings these decisions in line with Sixth Amendment precedent. This Court has consistently tied the Sixth Amendment right counsel to charged crimes. The initiation of judicial proceedings is no mere formalism, but instead essential to the proper application of the right. Since the "closely related" exception has sown confusion in the courts, it should be abandoned.

Instead of any "closely related" exception to offense specificity, exclusion should be limited to evidence that is material to guilt of the charged offense. The Sixth Amendment prevents the state from circumventing the right to counsel in the charged offense. If evidence is not material to the charged offense, then the Sixth Amendment is not violated, regardless of how it is obtained. Circumvention is prevented by extending *Massiah*'s exclusionary rule to cover use of material evidence obtained in violation of *Massiah* in the trial of a related offense. Finally, this rule avoids the two evils of unduly hindering investigation and excluding probative evidence discovered in good faith by police who inadvertently step over an ill-defined line.

Because the criminal investigation cannot be neatly segmented, some legitimate investigations will turn up evidence relevant to previously charged offenses. Instead of throwing out valid, highly probative confessions for the slightest taint, the balance of interests warrants a more restrained approach. The materiality standard of *Brady* v. *Maryland*, 373 U. S. 83 (1963) provides the correct middle way. Instead of asking whether the charged and uncharged crimes are "inextricably intertwined," courts should ask whether confidence in the defendant's guilt of the charged offense reasonably would have changed if the statement had not been obtained.

This test would provide a much cleaner path to the same result in most of those cases that have grappled with the "inextricably intertwined exception." The path to the correct result in this case is similarly clear. Since Cobb had all but pled guilty to the charged burglary before his murder confession, his second interrogation did not prejudice his Sixth Amendment right in the burglary.[2]

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2. In our brief supporting the petition for writ of certiorari, we argued that the rule of *Michigan* v. *Jackson*, 475 U. S. 625 (1986) should not apply to invalidate an otherwise valid waiver which follows both a break in custody and actual consultation with counsel. We do not brief that point here because it is not within the questions to which the Court limited its grant of certiorari. We suggest that an express reservation of the point would be in order to preclude any inference that it is decided *sub silento* in this case. Cf. *California* v. *Hodari D.*, 499 U. S. 621, 623, n. 1 (1991) (reserving point); *Illinois* v. *Wardlow*, 528 U. S. __, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000) (deciding point).

ARGUMENT

I. The question in this case is not whether there is an "exception" to offense specificity of the Sixth Amendment, but rather the scope of the rule of exclusion of evidence obtained in violation of the Sixth Amendment.

Most of the Courts of Appeals and state courts discussing this area speak of an "exception" to the rule of *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991), that the right to have counsel present during questioning after initiation of criminal proceedings is offense specific. A typical characterization can be found in *United States* v. *Hines*, 963 F. 2d 255, 257 (CA9 1992): "An exception to the offense-specific requirement of the Sixth Amendment occurs when the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense."

Although most of these cases arrive at the correct result, *amicus* believes that analyzing the problem in terms of an "exception" to *McNeil* is an undesirable approach. The "exception" approach needlessly clouds the issue and dilutes the constitutional principle of *McNeil*. It contradicts the clear language of this Court's cases, which state the rule without exceptions. A better approach, *amicus* submits, is to ask whether the interrogation has violated the Sixth Amendment with regard to the charged offense and, if so, further ask whether and to what extent that violation requires the exclusion of evidence in the trial of a not-then-charged but related offense.

A. The General Rules: Massiah and McNeil.

The basic rules are well established. "Once a person has been formally charged, . . . , the Sixth Amendment right to counsel attaches, *Massiah* v. *United States*, 377 U. S. 201, 206 . . . (1964), and the police may not question a person so

charged, who is represented or has sought representation, *Michigan* v. *Jackson*, 475 U. S. 625, 632-635 . . . (1986) without the consent of counsel." *Commonwealth* v. *Rainwater*, 681 N. E. 2d 1218, 1221-1222 (Mass. 1997). "The Sixth Amendment right, however, is offense specific. . . . And . . . so also its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *McNeil*, *supra*, 501 U. S., at 175. Where no invalidating rule such as *Jackson* applies, an otherwise valid waiver complying with the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is effective to waive both the Fifth Amendment and Sixth Amendment rights to have counsel present during questioning. See *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988).

The seeming clarity of the offense specificity principle is obscured by unexplained or only partially explained results in a couple of this Court's cases. From *Maine* v. *Moulton*, 474 U. S. 159 (1985) and *Brewer* v. *Williams*, 430 U. S. 387 (1977), some courts have fashioned an exception to the rule that the Sixth Amendment right to counsel applies only to charged crimes, holding that the right attaches to uncharged crimes that are "inextricably intertwined" with a formally charged offense. See, *e.g.*, App. to Pet. for Cert. A-6 to A-7; *Hines*, *supra*, 963 F. 2d, at 257; *Rainwater*, *supra*, 681 N. E. 2d, at 1223-1224, n. 5 (collecting cases).

Although an exception would explain the results in these cases, it would create inconsistencies. Most statements from this Court concerning the relationship between the Sixth Amendment and uncharged crimes contradict the notion that the right to counsel extends beyond formally charged crimes. Precedent and the rationale of the Sixth Amendment right to counsel argue against turning this unstated inference into a constitutional rule, particularly where there is a better alternative.

B. Maine v. Moulton.

Maine v. *Moulton*, *supra*, is the case usually invoked to support the existence of an "inextricably intertwined exception." This case must be read carefully. A close reading of this decision dispels the inference that it supports the "exception."

The case involved a series of automobile thefts by Moulton and his codefendant Colson from a neighboring car dealership. 474 U. S., at 161-162. On April 7, 1981, Moulton and Colson were indicted on four counts of "theft by receiving." Stolen vehicles and auto parts had been found in a building on the dealership's property rented by the two defendants. *Id.*, at 162. In November of 1982, Colson received threats against him and Moulton. That same month, while Colson and Moulton were discussing the case, Moulton suggested killing a prosecution witness. *Ibid.* Colson then went to the police. In return for not being charged with additional crimes, Colson agreed to testify against Moulton and cooperate with the prosecution. *Id.*, at 163. To deal with the threats against him, Colson also agreed to tape any phone call that contained an anonymous threat or that was from Moulton. *Ibid.* On December 26, 1982, Colson wore a wire transmitter and recorded a meeting with Moulton, in which the two discussed their case. See *id.*, at 164-166.

Once Colson's role as an informant was revealed, the state dismissed the pending indictments and obtained seven new indictments against Moulton. *Id.*, at 167. The new indictment restated the pending charges while adding burglary, arson, and three more counts. *Ibid.* "Moulton pleaded guilty to the charges contained in two of these indictments, and the trial court dismissed two more for improper venue." *Ibid.* He opted for a bench trial on the remaining charges. The state did not offer any of the phone conversations as evidence, but portions of the December 26 meeting were admitted against Moulton. *Ibid.* These portions dealt primarily with discussions concerning "the thefts for which Moulton was originally indicted." *Ibid.* Only one portion of the discussion about false testimony was admitted, while the discussion about killing witnesses was

not admitted. *Ibid.* The trial court dismissed one theft count for improper venue, acquitted Moulton on the arson charge, but convicted him of all other charges. *Ibid.* The Maine Supreme Court reversed the conviction, holding that admitting the body-wire tapes violated Moulton's Sixth Amendment right to counsel. See *State* v. *Moulton*, 481 A. 2d 155, 161 (Me. 1984).

This Court affirmed the Maine Supreme Court's opinion in its entirety. See *Maine* v. *Moulton*, 474 U. S., at 168. Because the Maine Supreme Court vacated a burglary conviction that was not one of the initially charged crimes, some courts have inferred that *Moulton* creates an exception to the rule that the Sixth Amendment only extends to charged crimes. See, *e.g.*, *United States* v. *Melgar*, 139 F. 3d 1005, 1013 (CA4 1998); *United States* v. *Mitcheltree*, 940 F. 2d 1329, 1342-1343 (CA10 1991). Although this inference may be consistent with the disposition in *Moulton*, it contradicts the language of the opinion.

The *Moulton* Court began its analysis with the importance of the Sixth Amendment right to counsel to a fair trial, finding the right "indispensable to the fair administration of our adversarial system of criminal justice." The right to "the guiding hand of counsel at every step in the proceedings against him," *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932); *Moulton*, *supra*, 474 U. S., at 169, was not limited to the trial. It extended to " 'critical stages' in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' " *Moulton*, 474 U. S., at 170 (quoting *United States* v. *Wade*, 388 U. S. 218, 224 (1967)). While this right began before the trial, it still had a definite starting point. The "initiation of adversary criminal proceedings" was the key to unlocking the Sixth Amendment right because this event signaled that the government and the accused were now adversaries. *Ibid.* Because the defendant at that point " ' "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law" ' " the Sixth Amend-

ment right to counsel began. See *ibid.* (quoting *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984), quoting in turn *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972)).

The *Moulton* Court found that the case was an application of *Massiah* v. *United States*, 377 U. S. 201 (1964) and *United States* v. *Henry*, 447 U. S. 264 (1980). Having Colson record the conversations with Moulton and admitting them as evidence thus violated the Sixth Amendment because this practice "obtains incriminating evidence by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Moulton*, *supra*, 474 U. S., at 176.

Much of *Moulton*'s analysis addressed the state's purpose in wiring Colson. The Solicitor General argued that the statements should not be suppressed because the state wired Colson to investigate the threats against the other witness and Colson. *Id.*, at 178. The *Moulton* Court dismissed this argument, noting that *Massiah* recognized the importance of allowing the state to continue investigating after charges are filed, but still forbade the government from using incriminating statements made concerning *charged* crimes. See *id.*, at 178-179.

The balance between the state's legitimate interest in further investigation and the Sixth Amendment right highlights the necessity of the formal charge. The Court understood that the police have an interest in both thoroughly investigating both crimes for which formal charges have already been filed and "new or additional crimes." *Id.*, at 179. More importantly, "law enforcement officials investigating an individual suspected of one crime and formally charged with another crime obviously seek to discover evidence useful at a trial of either crime." *Ibid.* To balance the competing interests, this Court drew a line between charged and uncharged crimes.

> "In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by

> the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the eviscera-tion of the Sixth Amendment right recognized in *Massiah*. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." *Id.*, at 179-180.

Because the Sixth Amendment right attaches at the critical stage of the prosecution, the line must be drawn between formally charged and uncharged crimes. For example, because the pending "charges were the only subject to be discussed at Colson's December 26 meeting with Moulton, a Sixth Amendment violation was inevitable . . . ." *Id.*, at 178, n. 14. On the other hand, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial for those offenses." *Id.*, at 180, n. 16.

It is difficult to square this language with the reversal of the burglary conviction. Since Moulton was not indicted for burglary until after the December 26 meeting, his Sixth Amendment right to counsel had not yet attached, as there had not yet been any critical stage proceedings for this crime. Cf. *id.*, at 170.

The *Moulton* Court's failure to explain its reversal of both the burglary and the theft charges appears to be due to the way the case was briefed. The arguments of both the state and federal governments were aimed at saving all the convictions. The state's argument was that lack of intent to obtain information on the pending charges negated any Sixth Amendment violation. See Brief for Petitioner in *Maine* v. *Moulton*, No. 84-786, pp. 18-19. The Solicitor General's argument was that the police's purpose of investigating the uncharged offenses removed the case from the ambit of the *Massiah* doctrine and rendered the product of that interrogation fully admissible at a joint trial of both crimes. See Brief for United States as *Amicus Curiae* in *Maine* v. *Moulton*, No. 84-786, part B, last sentence ("*Massiah* did not require the exclusion *at the theft trial* . . ." (emphasis added)). The Court did not discuss whether the burglary conviction could be sustained separately because no one asked it to. Admission of Moulton's statements at his trial for theft was simple *Massiah* error, and the judgment resulting from that trial was reversed. A more finely tuned remedy would have required a more detailed analysis. None was given because none was asked.

While *Moulton*'s holdings on the arguments actually made and addressed are precedent, any unstated implications drawn from the burglary reversal are not. A ruling made in passing, where the underlying issue is not addressed, should not bind this Court. For example, even though this Court applied the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18 (1967) in several of its federal habeas decisions, this fact did not prevent the adoption of a lower harmless-error standard for federal habeas cases in *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993). The Court reasoned "since we have never squarely addressed the issue, and have at most *assumed* the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits." *Id.*, at 631 (emphasis added).

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be

considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511 (1925). The reversal of Moulton's burglary conviction along with the theft might or might not have been a correct result. When a point overlooked in an earlier case is squarely presented for decision, the later court ought not be limited in crafting its rule by any perceived need to be consistent with the earlier result.

Later decisions of this Court describing *Moulton* are consistent with the passage quoted *supra*, at 10-11. In *Moran* v. *Burbine*, 475 U. S. 412 (1986), which was decided the same term as *Moulton*, this Court described the investigation in *Moulton* as "yield[ing] evidence pertaining to two crimes. For one, the defendant had been indicted; for the other he had not." *Id.*, at 431. The Sixth Amendment barred statements concerning the indicted crimes, but not any unindicted crimes. See *ibid.* Similarly, in *Arizona* v. *Roberson*, 486 U. S. 675, 685 (1988), the investigation in *Moulton* was described as one where "the police were seeking information regarding both the crime for which Moulton had already been indicted, and a separate, inchoate scheme."

If there is an exception to the rule that the Sixth Amendment right to counsel does not attach to an offense until the offense reaches a critical stage, it must come from some other source than *Moulton*. That decision did not even indirectly recognize any such exception, and its language contradicts an idea of an exception to the Sixth Amendment rule. The next logical source of support for the "inextricably intertwined exception," this Court's other Sixth Amendment cases, offers no further support for it.

C. Other Cases.

Decisions both before and after *Moulton* reinforce the principle that the Sixth Amendment right to counsel extends only to formally charged crimes. One of the earlier decisions to address the relationship between the Sixth Amendment and uncharged crimes upheld the admission of postindictment

statements obtained by a government informer that "related to the commission of a quite separate offense . . . . " *Hoffa* v. *United States*, 385 U. S. 293, 308 (1966). Any other holding would be "unprecedented and irrational." *Id.*, at 307.

Brewer v. *Williams*, 430 U. S. 387 (1977) is sometimes cited along with *Moulton* as support for the "inextricably intertwined exception." See, *e.g.*, *United States* v. *Arnold*, 106 F. 3d 37, 40 (CA3 1997); *United States* v. *Melgar*, 139 F. 3d 1005, 1013, n. 1 (CA4 1998). *Williams* involved a defendant who had been arrested and arraigned on a child abduction charge. See 430 U. S., at 390-391. This was done in Davenport, Iowa, but Williams was to be driven by the authorities back to Des Moines, Iowa, the scene of the crime. See *id.*, at 391. Defendant had contacted a Des Moines lawyer, who convinced Williams to turn himself in to the Davenport police. The attorney had reached an agreement with the police that Williams was not to be questioned during the trip back from Davenport. *Ibid.* Williams was also twice advised by counsel not to talk to the authorities. See *ibid.* The Des Moines police who drove defendant back from Davenport broke this agreement, getting him to provide the location of the missing girl's body through the "Christian burial speech." See *id.*, at 392-393. Williams was indicted and convicted of first-degree murder. *Id.*, at 393-394. The Iowa Supreme Court affirmed the conviction, holding that defendant had waived his right to counsel during the ride. *Id.*, at 394. Williams successfully sought federal habeas relief in the District Court, which was affirmed on appeal. *Id.*, at 394-395.

Even though Williams had not yet been charged with murder when he effectively confessed, this Court affirmed suppressing the incriminating statements concerning the murder on Sixth Amendment right to counsel grounds. See *id.*, at 400-401. As in *Moulton*, the *Williams* Court reiterated the general rule that the Sixth Amendment right begins when the prosecution reaches a critical stage. *Id.*, at 398. This Court did not explain the relationship of uncharged offenses to the Sixth

Amendment, stating nothing more than that because judicial proceedings had been initiated against Williams, his Sixth Amendment right had attached before the automobile ride. *Id.*, at 399. The state did not contest that point. *Ibid.*

Arnold read this holding as implying an exception to offense specificity, 106 F. 3d, at 40, *i.e.*, that the Sixth Amendment right had attached to the murder as well as the abduction. However, there is another equally plausible mode of analysis that comes to the same result. The product of this interrogation was evidence proving Williams to be guilty of both the abduction and the murder. The interrogation violated Williams' attached Sixth Amendment rights on the abduction charge. The product was therefore illegally obtained evidence. The result in *Williams* is consistent with a rule that if material evidence is obtained in violation of *Massiah* with regard to a pending charge, that evidence is not admissible at the trial of the pending charge or of other charges that may be brought later.

Williams must also be examined in the context of later decisions. *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991) directly confronted the issue of whether the Sixth Amendment right to counsel extended to uncharged crimes. "The Sixth Amendment right, however, is *offense specific*. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, ' "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ' " *Id.*, at 175 (emphasis added) (quoting *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984), quoting in turn *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)).

This provides the necessary context to dispel ambiguities about the meaning of *Williams* or *Moulton*. *Gouveia* is also quoted in the portions of *Moulton* and *Williams* that explain the scope of the Sixth Amendment right. See *Williams*, *supra*, 430 U. S., at 398; *Moulton*, *supra*, 474 U. S., at 170. *Moulton* was even quoted by *McNeil* to support the Sixth Amendment's offense-specificity. *McNeil*, *supra*, 501 U. S., at 175-176.

After *McNeil*, cases relying on *Williams* for the proposition that the Sixth Amendment is not offense specific "are no longer vital." *People* v. *Clair*, 2 Cal. 4th 629, 658, 828 P. 2d 705, 722 (Cal. 1992).

Other decisions define the limits of the Sixth Amendment as explicitly as *McNeil*. In *Illinois* v. *Perkins*, 496 U. S. 292, 294 (1990), an undercover agent was allowed to obtain incriminating statements from a prisoner regarding a crime unrelated to the charges for which the prisoner was incarcerated. *Massiah*, *Henry*, and *Moulton* did not apply, because "[i]n the instant case no charges had been filed on the subject of the interrogation and our Sixth Amendment precedents are not applicable." *Id.*, at 299.

Arizona v. *Roberson*, *supra*, contrasted the limits of the Sixth Amendment right to counsel with the broader Fifth Amendment prophylactic of *Edwards* v. *Arizona*, 451 U. S. 477 (1981). Arizona invoked *Moulton* in an attempt to limit the *Edwards* rule to charged offenses. See *Roberson*, 486 U. S., at 684. This Court admitted that in *Moulton* "we recognized, though, that the continuing investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to the assistance of counsel." *Ibid.* The *Edwards* rule, derived from the Fifth Amendment context of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), was distinguishable from the very different Sixth Amendment context of *Moulton* and *Massiah*. In contrast to the Fifth Amendment prophylaxis, which "counteract[s] the inherent pressures of custodial interrogation," the Sixth Amendment right "arises from the fact that the suspect has been *formally charged* with a *particular* crime and thus is facing a state apparatus that has been geared to prosecute him." *Roberson*, 486 U. S., at 685 (emphasis added).

Another case that clarifies *Moulton* is *Moran* v. *Burbine*, 475 U. S. 412 (1986). The Court noted, "It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the

Sixth Amendment right to counsel initially attaches." *Id.*, at 428. Therefore, as *Moulton* and *Williams* recognize, once the Sixth Amendment right to counsel attaches, "the police may not interfere with the efforts of a defendant's attorney to act as a ' "medium" between [the suspect] and the State' during the interrogation." *Ibid.* (quoting *Moulton*, *supra*, 474 U. S., at 176). The defendant's problem was that the "interrogation took place *before* the initiation of 'adversary judicial proceedings.' " *Ibid.* (emphasis in original) (quoting *Gouveia*, *supra*, 467 U. S., at 192). The fact that counsel had been retained for him was thus irrelevant.

Moran's true significance comes from the defendant's unsuccessful attempt to get around this roadblock. He asserted that the Sixth Amendment protects the attorney-client relationship without regard to whether the prosecution has formally started. *Id.*, at 428-429. The "critical stage" cases therefore "concern only the narrow question of when the right *to* counsel—that is to the appointment of counsel—attaches." *Id.*, at 429 (emphasis in original). The right to noninterference, the defense argued, attached when the relationship was formed, or at least when the custodial interrogation began. *Ibid.*

In addition to being impractical, see *id.*, at 430, this argument had serious theoretical shortcomings. "The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." *Ibid.* Instead, "it becomes applicable only when the government's role shifts from investigation to accusation." *Ibid.*

Moran's analysis of what triggered the Sixth Amendment right to counsel removes any remaining doubts about *Moulton*:

> "Indeed, in *Maine* v. *Moulton*, decided this Term, the Court again confirmed that looking to the initiation of adversary judicial proceedings, far from being mere formalism, *is fundamental to the proper application of the Sixth*

Amendment right to counsel. There, we considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to two crimes. For one, the defendant had been indicted; for the other, he had not. . . . The Court made clear, however, that the *evidence concerning the crime for which the defendant had not been indicted*—evidence obtained in precisely the same manner from the identical suspect—would be *admissible at a trial limited to those charges*." *Id.*, at 431 (emphasis added).

Moran's interpretation of *Moulton* confirms two points. First, there is a clear break between charged and uncharged offenses. There is no fuzzy exception. Second, admissibility of the evidence depends on the relation between the evidence and the two crimes. If it concerns only the uncharged offense, it is admissible in a trial for that offense regardless of how closely the two offenses may be related in other ways.

D. Confusion Defining "Closely Related."

The focus on the degree of relation between the offenses has produced confusion and inconsistent results. Some courts require only that the cases be "closely related." See, *e.g.*, *Arnold*, *supra*, 106 F. 3d, at 42. Others require that they be "*extremely* closely related." See, *e.g.*, *United States* v. *Cooper*, 949 F. 2d 737, 744 (CA5 1991) (emphasis in original). As this Court has noted in another context, vague terms cannot be made precise merely by piling on adverbs. See *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988). In deciding whether cases are "closely related" enough to qualify for the perceived exception, courts have come to opposite results on nearly indistinguishable facts. In *Whittlesey* v. *State*, 665 A. 2d 223, 236 (Md. 1995), the Maryland Court of Appeals decided that murder and making false statements about the murder were not close enough, as they involved different acts at different times. Those distinctions were equally present in *Arnold*, which involved solicitation to murder a witness and a prior intimidation of the same witness, yet the court said, "it is difficult to

understand how [the two crimes] could be any more closely related." 106 F. 3d, at 42.

Perhaps recognizing the vagueness of "closely related" as the defining criterion, some "courts have looked for identity of time, place, and conduct." *Whittlesey*, 665 A. 2d, at 235 (collecting cases). Such an approach helps narrow the exception and provides guidance for trial courts, but does not necessarily give the needed guidance to police. At the investigation stage, these elements may not be known. For example, consider a variation on the present case where a house has been burglarized, the residents are missing, and the burglar has been caught. Did the burglar kill the residents at the time and place of the burglary, or did someone else kidnap them the day before, miles away, with the burglar merely taking advantage of the now-vacant house? The police may not know the answer at the time they question the burglar. Finding the answer may be the reason they want to question him.

The path to a better approach is indicated in *United States* v. *Melgar*, 139 F. 3d 1005, 1014-1015 (CA4 1998), holding that factual relation of the crimes is not enough. "A defendant must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses. [Citation.] Courts have not applied the closely related exception in favor of a defendant absent the production of such evidence. [Citations.]" *Id.*, at 1015.

II. Exclusion of evidence should be limited to evidence material to guilt of the charged offense.

The shape of the correct rule is determined by the evil it is meant to prevent and the need to prevent the rule itself from causing new evils. The evil to be prevented is the state's violation of the Sixth Amendment by circumventing the right to counsel on the *charged* offense. See *Maine* v. *Moulton*, 474 U. S. 159, 170-171 (1985). Gathering evidence which is not material to the charged offense, regardless of how it is obtained,

does not violate (or circumvent) any rights regarding *that* offense. Conversely, circumvention is fully prevented by extending the exclusionary rule of *Massiah* to cover use of material evidence obtained in violation of the *Massiah* right in the trial of a related offense. See *Massiah* v. *United States*, 377 U. S. 201, 207 (1964). The new evils to be avoided are (1) undue hindrance of the investigation of additional crimes, and (2) obstruction of the truth-seeking purpose of trials by excluding probative evidence obtained in good faith by police who are found after the fact to have inadvertently stepped over an ill-defined line.

The first filter to apply is to ask whether there has been a violation of the Sixth Amendment with regard to the previously charged offense. Did the police "*knowingly* circumvent[] [defendant's] right to have counsel present at a confrontation between [him] and a police agent . . ."? *Moulton*, *supra*, 474 U. S. at 180 (emphasis added). The key word is "knowingly" rather than "intentionally." On one hand, the presence of an additional motive does not justify an interrogation which the police know will likely produce evidence which is incriminating on the charged offense. *Id.*, at 176, n. 12, 180. On the other hand, police questioning the defendant about another crime have committed no violation if he unexpectedly blurts out a confession to the charged crime. Similarly, an incidental mention of the previous offense, unlikely to produce material evidence in relation to it, is not a violation. See *Commonwealth* v. *Rainwater*, 681 N. E. 2d 1218, 1226 (Mass. 1997). If the questioning produced no evidence relevant to the offense to which the Sixth Amendment right to counsel has attached, the police have done nothing wrong, and there is no basis for excluding any evidence. If the defendant's statement contains severable elements, some of which are relevant to the charged offense and some not, those that are not are admissible in trials for other offenses. That is true regardless of how probative the other statements may be to the charged offense. See *id.*, at 1225; see also *Moulton*, 474 U. S., at 180, n. 16.

Where two offenses are related, it will often happen that compelling evidence of the second offense will have some minor, tangential probative value of guilt of the first offense. In *Rainwater*, for example, because of the defendant's *modus operandi* in a string of thefts, his guilt of one crime had some probative value indicating his guilt of the others. See 681 N. E. 2d, at 1224. Similarly, in *United States* v. *Melgar*, 139 F. 3d 1005, 1015 (CA4 1998), evidence of the defendant's illegal entry into the United States had probative value as motive for his possession of fake identification.

At this point, the rule to be defined must take into account the need to avoid undue hindrance with investigations. As *Moulton* recognized, society has a powerful interest in allowing such investigation to proceed. See 474 U. S., at 180. Crime is not neatly segmented. Inevitably, entirely legitimate investigation of uncharged offenses will turn up evidence relevant to previously charged offenses.

There are two polar positions that might be taken here, and the *Melgar* case illustrates both of them. The District Court believed that the evidence had to be necessary to the prosecution of the charged offense. See *Melgar*, *supra*, 139 F. 3d, at 1015. The Court of Appeals disagreed, noting a long series of Sixth Amendment cases referring only to "incriminating" evidence. *Ibid.* From these cases, the court apparently concluded that mere relevance was enough. *Ibid.*

Amicus submits that neither of the polar extremes explored in *Melgar* is appropriate. Evidence can be less than necessary to the prosecution and still improperly harm defendant's right to counsel for the charged offense. The relevance standard, however, is too low. The purpose of exclusion is to protect the right to counsel in the charged crime from being circumvented, but this protection comes at a high cost. It suppresses the otherwise valid confession to the uncharged crime, an offense for which the Sixth Amendment right has not yet formally attached at the time of the interrogation. Because of their high cost, exclusionary rules should not be extended any further than

is strictly necessary to achieve their purpose. See *United States* v. *Payner*, 447 U. S. 727, 734-735 (1980). The derivative exclusionary rule at issue here must be limited to inculpatory statements which are actually prejudicial, not to those merely relevant, *i.e.*, "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule. Evid. 401.

Seeking a standard to apply, the Court of Appeals in *Melgar* looked to confession cases, both the Sixth Amendment cases of *Massiah* v. *United States*, 377 U. S. 201 (1964) and *United States* v. *Henry*, 447 U. S. 264 (1980), and the Fifth Amendment cases of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and *Rhode Island* v. *Innis*, 446 U. S. 291 (1980). See *Melgar*, *supra*, 139 F. 3d, at 1015. These cases are inapposite because they involve direct violations of the constitutional right, in *Henry* and *Massiah* by undercover agents eliciting incriminating statements about the indicted crime, and in *Innis* and *Miranda* by an interrogation that violates the self-incrimination privilege. In these cases of direct violations of the defendant's rights in the same case, materiality is only relevant to harmless error analysis. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U. S. 279, 295-296 (1991). It is therefore unnecessary for these cases to distinguish various levels of inculpation. The fact that the "privilege against self-incrimination . . . does not distinguish degrees of self-incrimination," *Miranda*, 384 U. S., at 476, is thus irrelevant to the present case.

The balance of interests involved in extending the exclusionary rule to a different case warrants a more restrained approach to the quantum of evidence. The materiality standard of *Brady* v. *Maryland*, 373 U. S. 83 (1963) and its progeny provides that middle way. In these cases, due process is not violated every time the prosecution fails to disclose evidence favorable to the defendant. Instead, the nondisclosure only "violates due process where the evidence is material to guilt or to punishment . . . . " *Id.*, at 87. This materiality requirement

creates a prejudice standard that the defendant must satisfy for a court to find a due process violation. See *Strickler* v. *Greene*, 527 U. S. 263, 281-282 (1999). Although the *Brady* standard deals with withheld evidence, as opposed to the admitted evidence in the present case, the due process test is easily adapted to a Sixth Amendment context. Instead of asking whether " 'there is a reasonable probability' that the result of the trial would have been different if the [evidence] had been disclosed," *id.*, at 289, courts should instead ask whether confidence in the defendant's guilt of the *charged* offense would be undermined if the statement had not been obtained. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984).

Our proposed rule would also provide clearer guidance to police. They need not guess whether a court at some point in the future will find two offenses "closely related." Existing law already instructs the police that once a "suspect" becomes an "accused" their scope of action is limited. *Michigan* v. *Jackson*, 475 U. S. 625, 632 (1986). At that point, they can no longer knowingly create situations likely to produce statements which are incriminating as to the charged offense in the absence of counsel, see *Maine* v. *Moulton*, *supra*, 474 U. S., at 176, n. 12, without a valid waiver. Our proposed rule merely adds the additional caveat that, in the process of questioning about other offenses, the police should not *knowingly* solicit information *material* to guilt of the charged offense. This structure places the emphasis on materiality of evidence, terrain familiar to detectives, rather than relatedness of offenses, which may turn on facts unknown to the police at the time of questioning. See *supra*, at 19.

This test would provide a cleaner path to the same result in most of the cases that have grappled with the "inextricably intertwined exception." In *United States* v. *Cooper*, 949 F. 2d 737, 743 (CA5 1991), the statements relevant to the previously charged offense were never admitted in evidence. Under our proposed test, the analysis can stop there. If the statements arguably obtained in violation of the Sixth Amendment are

suppressed, defendant has received the remedy to which he is entitled. Statements relevant only to the subsequently charged offense present no Sixth Amendment issue. See *Hoffa* v. *United States*, 385 U. S. 293, 307-308 (1966). In *United States* v. *Kidd*, 12 F. 3d 30, 32-33 (CA4 1993), the tape recorded transaction with an informant produced no evidence relevant to the pending charges at all. There simply is no Sixth Amendment problem here.

In *Rainwater*, which comes closest to the present case, the defendant "had been caught red-handed . . . and pleaded guilty to [the charged] offense." 681 N. E. 2d, at 1225. The "brief and insignificant" statement about the charged offense, see *id.*, at 1226, had no effect on the level of confidence in his guilt of that offense. Any incidental violation of the Sixth Amendment with regard to that offense is insufficient to justify suppression of evidence in the trial of another offense. *Rainwater*'s invocation of the harmless-error doctrine, see *ibid.*, while correct, is unnecessary. There was no error. Harmless error was similarly unnecessary in *Melgar, supra*, 139 F. 3d, at 1016. Caught red-handed with an obviously fake ID, *ibid.*, the evidence of motive of illegal entry into the United States, see *id.*, at 1015, was entirely unnecessary and added nothing of substance to confidence in his guilt. On the other side of the scale, we find cases such as *In Interest of Pack*, 616 A. 2d 1006, 1011 (Pa. Super. 1992), where Pack's admission to burglary was also powerful evidence of guilt of the charged offense—receiving the stolen property taken in the burglary. This is also consistent with the result in *Brewer* v. *Williams*, 430 U. S. 387 (1977), see *supra*, at 14-15, where the same evidence sealed Williams' guilt of both abduction and murder.

One case that would have, and we submit should have, been decided differently is *United States* v. *Arnold*, 106 F. 3d 37 (CA3 1997). In that case, the court decided that the use of an informant was harmless Sixth Amendment error as to the offense for which the Sixth Amendment right *had* attached, because the other evidence of that offense was overwhelming.

See 106 F. 3d, at 42, n. 2. Yet the court suppressed the evidence and reversed the conviction on the offense for which the Sixth Amendment right had *not* attached. This is a nonsensical result, which could have been avoided by proper analysis of the evidence and its materiality to the two offenses.

In the present case, the Texas Court of Criminal Appeals' analysis is cursory, at best. See App. to Pet. for Cert. A-7 to A-8. More care is in order before setting a murderer back on the street. This case calls for a close examination of whether there was any violation of Cobb's Sixth Amendment rights with regard to the burglary charge, the only charge to which the Sixth Amendment had attached, and, if so, whether that violation warrants exclusion of evidence from his trial for murder.

There was some factual connection between the two crimes. The mother was murdered in the course of the burglary and her baby was buried alive soon after. See *id.*, at A-9 to A-10 (dissent). Mere factual connection, however, is not enough. The confession must prejudice the defendant's right to counsel in his burglary offense. Since the defendant had already validly confessed to the burglary before the burglary indictment or the murder confession, see *id.*, at A-4, his right to counsel on that offense was not harmed by anything he said in his second confession. Cobb had all but pled guilty to the charged crime of burglary. Indeed, a little before the murder confession, the defense and the prosecution had almost concluded a plea agreement. See *id.*, at B-6. Since the authorities already had all the evidence they needed on the burglary charge, the murders must have been the near-exclusive focus of this last interrogation. Without the confession at issue here, our confidence in Cobb's guilt of burglary would not be undermined. Because the murder confession was not material to the defendant's burglary case, Cobb's Sixth Amendment rights were not harmed by this interrogation. Absent any tangible harm, the Sixth Amendment provides no basis for suppression of evidence in the murder trial.

CONCLUSION

The decision of the Texas Court of Criminal Appeals should be reversed.

August, 2000

Respectfully submitted,

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OCT 10 2000

In The

Supreme Court of The United States

TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ Of Certiorari To The
Court of Criminal Appeals of Texas

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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Questions Presented

I.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when his eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

II.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study in the field of criminal law; to advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that the administration of justice is handled in a proper and fair manner.

The National Legal Aid and Defender Association (NLADA), is a private, non-profit membership organization, founded in 1911. Its membership is comprised of approximately 3,000 offices that provide legal services to poor people, including the majority of public defender offices, coordinated assigned counsel systems and legal services agencies around the nation. The NLADA's primary purpose is to assist in affording effective legal services to people unable to retain counsel, as the Fifth and Sixth Amendment right to counsel enables poor people in our criminal justice system to assert all of their other rights.

The primary interest of *amici* in this case is the potential impact on the integrity of the attorney-client relationship in prosecutions for factually related offenses. As this Court recognized in *Maine v. Moulton*, 474 U.S. 159, 176 (1985), criminal defendants, who are often uneducated and lack an awareness of

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than amici curiae, made a monetary contribution to the preparation or submission of this brief.

the law, have a right to rely on counsel as a "medium" between the accused and the prosecution. A decision adopting Texas's position will undermine an accused's Sixth Amendment right to counsel by permitting questioning of the accused, without appointed counsel present, on matters that necessarily relate to the offense or offenses on which counsel was appointed to represent the accused. *Amici* concentrate on the merits of adhering to this Court's precedent, and that of all the lower federal and state courts, which support a "closely related offenses" test to protect the attorney-client relationship once the right to counsel has attached. Because the decision of the Texas Court of Criminal Appeals keeps faith with this Court's precedent in holding that since the Sixth Amendment right to counsel had attached on the burglary charge, thereby precluding any police interrogation of the defendant about the original offense or any "closely related offenses," *amici* respectfully submit this brief *amicus curiae* in support of Respondent, Raymond Levi Cobb.

STATEMENT OF THE CASE

In February 1994, the police in Walker County, Texas, arrested seventeen year-old Raymond Cobb for the December 27, 1993, burglary of the Owings' residence. Originally, Mr. Cobb denied involvement in the burglary, but in July 1994, he made a voluntary written statement admitting involvement in the burglary but denying any part in the disappearances of Maggie and Kori Ann Owings. Texas District Court Findings of Fact (hereinafter "Findings"), #14 at 2.

After this statement, on August 15, 1994, Mr. Cobb was indicted for the Owings burglary. At his arraignment, the 12th District Court for Walker County appointed attorney Hal Ridley to represent Mr. Cobb. Findings, #9 at 2. Initially, Ridley was hesitant to represent Cobb because of the connection between the burglary and the disappearance of the Owings, and because he was "coming off the trial of another capital case ... [and]

really didn't want to get involved in another one right behind that, if Mr. Cobb was in fact a suspect." S.F. Vol. 2 at 252.

Every time they questioned Mr. Cobb about the disappearances of the Owings, from August 1994 until November 12, 1995, the Walker County Sheriff's Department obtained permission from Ridley. S.F. Vol. 2, at 256. Ridley twice consented to the interrogations, "relying upon the representations of the law enforcement officers that [Cobb] was not a suspect in this capital murder case." Findings, # 15 at 3. Detective Debbie Funk, the officer first assigned to investigate the Owings disappearance, demonstrated that these representations by the Sheriff's department were false: She testified that local law enforcement always considered Cobb to be a suspect in the disappearances. S.F. Vol. 2 at 220.

Mr. Cobb was released on bond in the burglary case. He then moved to Odessa, Texas, to live with his father Charles Cobb. Findings, #17 at 3. Attorney Ridley told both Raymond and Charles Cobb to call him if the police ever contacted them again about the Owings case. Findings, #19 at 3. Instead, after speaking to Walker County Det. Judy James (who had replaced Det. Funk) Charles Cobb questioned his son, then called James again to report that Raymond had confessed. S.F. Vol. 1 at 313. Det. James then called the Odessa police department and directed them to arrest Raymond Cobb for the murders of Maggie and Kori Ann Owings. S.F. Vol. 1 at 321-322. The Odessa police complied, and then called Det. James again, and she gave them her permission to interrogate Cobb. S.F. Vol. 1, at 325.

On several previous occasions, Detective James had discussed the Owings disappearance case with Cobb's attorney, Ridley. Indeed, as recently as September 13, 1995, she asked Ridley for his permission to interrogate Cobb about the disappearances. S.F. Vol. 1, at 213. Nevertheless, Detective James did not inform Ridley that Cobb was re-arrested, nor did she inform the Odessa investigators that Raymond Cobb already

had appointed counsel. S.F. Vol. 1, at 211-212, 330. In fact, Ridley testified that if he had been properly notified, he would have never allowed the interrogation:

Q: Mr. Ridley, if you had been contacted by [prosecutor] David Weeks or Judy James at 2:39 in the morning and informed by them that your client, Raymond Cobb, was under arrest for capital murder, would you have allowed law enforcement personnel to interview Raymond Cobb?

A: Not in a million years.

* * *

Q: Would you have allowed him to consent to a search of his residence?

A: Consent - I would have told him not to say anything, or do anything, or sign anything. S.F. Vol. 2 at 267.

At 3 o'clock in the morning on November 12, 1995, the Odessa police began questioning Cobb. S.F. Vol. 1, at 329. At 5:00 a.m., Harold Thomas of the Odessa Police Department obtained an incriminating statement from Cobb. S.F. Vol. 1, at 346-347. After he was arrested and charged with capital murder, Cobb was flown to Walker County, where the police had him lead them to the Owings' burial site. Findings, #18 at 3.

Only after these events did the Walker County District Attorney contact attorney Ridley. The District Attorney told Ridley that his client had been arrested in Odessa, interrogated, brought before a magistrate, and ultimately led the police on a search for evidence. Findings, #18 at 3. The Sheriff's department subsequently called attorney Ridley to obtain his permission for the second grave-site visit and to request that Ridley visit Cobb. Thereafter, Ridley was appointed as counsel for Cobb on the capital murder charges. S.F. Vol. 2, at 261- 263.

Raymond Cobb was ultimately indicted for two capital offenses in a single indictment: Murder of two people in the same transaction, and murder in the course of burglary. Appendix A. The trial court denied Cobb's Motion to Suppress the Confession. Dist. Ct. Findings of Fact at 1. At the suppression hearing, Cobb's counsel pointed out the overlap between the "burglary," for which Cobb was represented at the time of the interrogation, and the "murder in the course of burglary" count. The prosecution *thereafter* abandoned the count that charged murder in the course of burglary, and proceeded only on count one of the indictment. S.F. Vol. 2 at 286-287. Cobb was found guilty of killing two people in the same criminal transaction and sentenced to death.

The Texas Court of Criminal Appeals reversed Cobb's conviction, holding that the Sixth Amendment right to counsel had the charge of capital murder charge because it was "factually interwoven with the burglary." *Cobb* v. *State*, No. 72,807, 2000 WL 275644, *13 (Tex. Crim. App. Mar. 15, 2000)(en banc).

SUMMARY OF ARGUMENT

I. The Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). To safeguard the defendant's ability to rely upon counsel, this Court prohibited police-initiated interrogation of defendants who invoke the right to an attorney at their arraignment. *Michigan v. Jackson*, 475 U.S. 625 (1986). Because Cobb had "accepted by appointment, a lawyer to represent him at the time he was questioned by authorities," *Patterson v. Illinois*, 487 U.S. 285, 290 n.3, he had asserted his right to counsel under *Jackson*. That months had passed since Cobb's assertion of his right to counsel is irrelevant, as is the fact that Cobb's counsel had on two prior occasions permitted interrogation in his absence.

II. Although the Sixth Amendment right protected by *Jackson* is "offense specific," the state cannot thwart that right by manipulation of the charged offense. A reading of "offense specific" that completely ignores the relationship between two closely related offenses would allow the state to circumvent the Sixth Amendment merely by charging a defendant with additional related crimes. This Court's precedents mandate an approach to "offense specific"that is sensitive to Sixth Amendment values rather than one focused on a comparison of the elements of charged and uncharged offenses. *Brewer v. Williams*, 430 U.S. 387 (1977); *Maine v. Moulton*, 474 U.S. 159 (1985).

III. *Every* lower court to address this issue since *Jackson* has recognized that a defendant's assertion of his Sixth Amendment rights with respect to a charged offense protects him against interrogation concerning closely related offenses. Moreover, although lower courts have varied slightly in their application of the "closely related" test, in *every* case where the transaction and sovereign are the same, courts have been unanimous in condemning uncounseled, police-initiated interrogation as an unjustifiable interference with the attached attorney-client relationship. Examined from either the perspective of the client or that of the lawyer, a same sovereign/same transaction rule provides the minimum protection of the relationship that is consistent with the purposes of the Sixth Amendment.

IV. Texas, and its supporting *amici*, urge this Court to adopt the double jeopardy "same offense" test for Sixth Amendment violations. Equating the Fifth Amendment double jeopardy clause's "same offense" test with the "offense specific" scope of Sixth Amendment rights cannot be reconciled with either the language of the two clauses or with this Court's decisions in *Brewer v. Williams*, 430 U.S. 387 (1977) and *Maine v. Moulton*, 474 U.S. 159 (1985). Moreover, vital differences in the competing interests of the defendant and the state in the double jeopardy and right to counsel contexts preclude using double jeopardy's "same offense" rule to redefine the "offense specific" scope of

Jackson. Finally, adoption of the proposed "same offense" test would lead to bizarre results and encourage offense manipulation aimed at thwarting an existing attorney-client relationship.

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ARGUMENT

I.
AT THE TIME OF HIS INTERROGATION, COBB'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD ATTACHED AND PROTECTED HIM FROM UNCOUNSELED INTERROGATION ON THE BURGLARY OFFENSE..

The Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The rule established in *Michigan v. Jackson*, 475 U.S. 625 (1986), is one important aspect of this guarantee.

A. Cobb Asserted His *Jackson* Right to Counsel.

To safeguard the defendant's ability to rely upon counsel, this Court extended the protection of *Edwards v. Arizona*, 451 U.S. 477 (1981) to defendants who request an attorney at their arraignment. *Edwards* set forth a per se rule that forbids interrogation of a person in custody who has requested the help of a lawyer. Although *Edwards* flows from the Fifth Amendment right to counsel at custodial interrogations, *Jackson* held that "the Sixth Amendment right to counsel at post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation," *Jackson*, 475 U.S. at 632. Thus, requests for counsel made during arraignments are subject to the same bright line rule.

The *Jackson* prohibition against uncounseled interrogation is not triggered by indictment or arraignment alone, but by the assertion or invocation of the Sixth Amendment right to counsel.

Patterson v. Illinois, 487 U.S. 285 (1988). In *Patterson*, this Court found it "significant that [Patterson] had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities." *Id.* at 290 n.3. Cobb, however, *had* "accepted by appointment" a lawyer to represent him. By the time he was interrogated, Cobb had both met with his lawyer and appeared with his lawyer in court. Texas's claim that these actions were inadequate evidence of Cobb's choice to rely upon counsel thus ignores *Patterson*. The language in *Patterson* is not an accident. *McNeil v. Wisconsin* similarly infers that the defendant invoked his Sixth Amendment right on an armed robbery charge from the fact that "an attorney from the Wisconsin Public Defender's office represented [him] at [an] initial appearance." 501 U.S. 171, 173 (1991).

Any finer parsing of the precise sequence of events leading up to the appointment of counsel at an arraignment would have ridiculous consequences. Surely a defendant cannot be deprived of *Jackson*'s protections by the happenstance that a diligent magistrate offers him counsel before he can "ask" for it; surely a defendant should not have to say "I do not accept your offer of counsel but I do request that counsel be appointed to represent me." Additionally, in many cases, as here, no transcribed record of the arraignment exists, so that exactly what was said and in what order will not be certain; the only thing that will be clear is whether counsel was appointed.[2]

B. No Exception to *Jackson* Applies in this Case.

Just as the fact that a defendant has already consulted with counsel does not remove the Fifth Amendment bar to further

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[2] Petitioner's citation of *Davis v. United States*, 512 U.S. 452 (1994) is inapposite. *Davis* holds that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459. A *Jackson* assertion occurs before a magistrate or judge; if the magistrate appoints counsel, the obligations of the police are clear.

interrogation, *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), the fact that months had passed since Cobb's assertion of his right to counsel is irrelevant. Similarly, that counsel in this case had twice permitted interrogation in his absence in no way waives Cobb's rights under *Jackson*. Counsel described his own reasoning as follows: He had previously agreed to Cobb's interrogation outside his presence because the police had assured him that his client was not a suspect in the homicide. Counsel unequivocally stated, however, that he would not "in a million years" have agreed to the interrogation in dispute because by then, the police had information that Cobb had made admissions to his own father concerning the homicide. This strategy is undoubtedly idiosyncratic, and perhaps questionable, but the vagaries of how counsel chooses to guide his client does not deprive the client of his right to that guidance.

Nor were the police actually confused about the scope of counsel's earlier permission to interrogate Cobb. The contemporaneous behavior of the police reveals that they did not think that counsel's agreement to interrogation in his absence on one occasion constituted standing permission; if they had, they would not have sought permission *twice* prior to the third and critical interrogation, at which they were prepared to confront Cobb with the admissions he had made to his father. It appears that they failed to seek permission the third time because they assumed and feared – rightly, as attorney Ridley subsequently testified – that he would *not* acquiesce under the new circumstances. This inference is bolstered by the fact that *after* they had confronted Cobb with his admissions and obtained a confession, they *once again* sought counsel's permission for an interview with his client. Finally, the state court found that counsel's prior agreement did not constitute continuing permission, and deference should be given to that finding, both because of its factual nature and because state courts have familiarity with local patterns of interactions between the police and members of the defense bar. *Cf. Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("[A] reviewing court should take care both to review findings of historical fact only for clear error and to

give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.")

Thus, *Jackson* clearly protected Cobb from police-initiated, uncounseled interrogation related to the burglary charge at the time police obtained his confession.

II.
THE STATE SHOULD NOT BE ALLOWED TO THWART THE SIXTH AMENDMENT *JACKSON* RIGHT BY MANIPULATING THE CHARGED OFFENSE..

Unlike *Edwards*, *Jackson* is "offense specific," *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); "[i]t cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." *Id.* This distinguishing limitation stems from the purpose of the Sixth Amendment guarantee, which is to "protec[t] the unaided layman at critical confrontations with his expert adversary, the government, after "the adverse positions of the government and defendant have solidified with respect to a particular offense." *Id.* at 177-78 (internal quotation marks and citation omitted). That the *Jackson* right is "offense specific," however, does not and cannot mean that the state is free to interfere with an attached, asserted attorney-client relationship simply because it has manipulated the "offense" in some superficial way.

A. The *Jackson* Right Would Become Meaningless If "Offense" Manipulation Were Unfettered.

At the extreme, both parties and all *amici* agree that the state cannot simply dismiss the indictment containing the charge for which the defendant is represented by counsel, question the defendant, and then file a new indictment. Nevertheless, such manipulation has been attempted, albeit unsuccessfully. *State v. Frye*, 897 S.W.2d 324 (Tex. Crim. App. 1995). Other purportedly literal readings of "offense specific" are equally implausible. Surely if a defendant obtains representation for a particular

burglary, which the indictment alleges occurred on one date, the state cannot interrogate that defendant, learn that the burglary actually occurred on another date, then drop the initial indictment, re-indict the defendant for burglary alleging the corrected date, and use his uncounseled statements at trial. Again, such manipulation has been attempted, but without success. *People v. Clankie*, 530 N.E. 2d 456 (Ill. 1988). Similarly, a reading of "offense specific" that completely ignores the relationship between two closely related offenses, such as theft and burglary, "would allow the [state] to circumvent the Sixth Amendment merely by charging a defendant with additional related crimes." *In Re Pack*, 616 A. 2d 1006 (Pa. Super. 1992), *allocatur denied*, 634 A. 2d 1117 (1993).

B. Precedent Compels A Functional Approach.

The decisions of this Court, not to mention common sense, mandate an approach to "offense specific" that is sensitive to Sixth Amendment values rather than one focused on dictionary definitions. *Brewer v. Williams*, 430 U.S. 387 (1977), holds that the commencement of legal proceedings against a defendant precludes police from deliberately eliciting incriminating statements from him in the absence of counsel. At the time Williams' statement was obtained, he had been arraigned and was represented on the charge of abducting a ten year old girl, *id.* at 390-91, but he was ultimately charged and convicted of her murder. *Id* at 389. The difference between the two charges, however, was neither dispositive nor even commented upon by this Court. Subsequently, in *Maine v. Moulton*, 474 U.S. 159 (1985), this Court *explicitly* distinguished the admissibility of "evidence pertaining to pending charges" from "evidence pertaining to charges as to which the Sixth Amendment right to counsel had not yet attached." *Id.* at 179-180. Importantly, this Court affirmed the reversal of Moulton's convictions not only for the theft for which he had been indicted at the time the evidence was elicited from him, but also for the factually interrelated burglary offense with which he was subsequently charged.

Finally, even Texas and the United States as *amicus* agree with Cobb that a reading of "offense specific" as "*identical* offense" is implausible. Thus the literal meaning of "offense specific" is not the dispute; the open question is how to best protect the attorney-client relationship without unduly infringing upon the state's legitimate interests.

III.
THE "CLOSELY RELATED" OFFENSE TEST APPLIED BY THE LOWER COURT ADEQUATELY PROTECTS THE ATTORNEY-CLIENT RELATIONSHIP AND ACCOMMODATES ALL LEGITIMATE STATE INTERESTS.

Every lower court to address this issue since *Jackson* has recognized that a defendant's assertion of his Sixth Amendment rights with respect to a charged offense protects him against interrogation concerning "closely related" or "very closely related" offenses. *See, e.g., United States v. Doherty*, 126 F. 3d 769, 776 (6th Cir. 1997) (collecting state and federal cases), *cert. denied*, 542 U.S. 917 (1998); *Whittlesey v. State*, 665 A. 2d 223 (Md. 1995) (same). Texas, and the supporting *amici*, conspicuously fail to cite a single lower court case that rejects this basic approach. Moreover, they cite no cases that apply the test to circumstances factually similar to this case without concluding that the offenses involved are in fact "closely related."

A. Where the Sovereign and the Criminal Transaction Are the Same, the Offense Is Always Closely Related.

In every case where the transaction and sovereign are the same, courts have been unanimous in condemning uncounseled, police-initiated interrogation as an unjustifiable interference with the attached attorney-client relationship. *See e.g., Taylor v. State*, 726 So. 842 (Fla. App. 1997); *People v. Clankie*, 530 N.E. 2d 448 (Ill. 1988); *People. v. Hoskins*, 523 N.E. 2d 80(Ill. 1988); *State v. Tucker*, 645 A. 2d 111 (N.J. 1994); *In Re Pack*, 616 A. 2d 1006 (Pa. Super. 1992), *allocatur denied*, 634 A. 2d1117 (1993); *Upton v. State*, 853 S.W. 2d 548 (Tex. Crim. App. 1993). *See also, United States v.*

Kidd, 12 F. 3d 30 (4th Cir. 1993); *Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992); *United States v. Carpenter*, 963 F.2d 736 (5th Cir. 1992); *United States v. Hines*, 963 F. 2d 255 (9th Cir. 1991); *United States v. Cooper*, 949 F.2d 737 (5th Cir. 1991); *People v. Spivey*, 615 N.E.2d 852 (Ill. 1993); *People v. Dotson*, 574 N.E.2d 143 (Ill. 1991); *Whittlesey v. State*, 665 A. 2d 223 (Md. 1994); *Commonwealth v. Rainwater*, 681 N.E. 2d 1219 (Mass. 1997). Examined from either the perspective of the client or that of the lawyer, a same sovereign/same transaction rule provides the minimum protection of the relationship that is consistent with the purposes of the Sixth Amendment.

In declining to apply the full sweep of the *Edwards/Roberson* rule to Sixth Amendment invocations, this Court has focused on what message or intention "can reasonably be construed" from a defendant's request at a judicial proceeding for the assistance of counsel. *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). Because "[o]ne might be quite willing to speak to police without counsel present on many matters, but not the matter under prosecution," this Court declined to construe an arraignment request for counsel as a conclusive indication that the defendant "desire[s] to deal with police only through counsel"on all matters. *Id.* Thus, the Court in *McNeil* rightly surmises that a defendant's arraignment invocation is "offense specific," meaning only that the crime about which the state wishes to question him is unlikely to be *totally immaterial* to the defendant's determination of whether he needs the guiding hand of counsel. To take an easy example, in the course of deciding to request counsel at arraignment on charges of receiving stolen property and theft, a defendant is unlikely to even *consider* whether he wants or needs representation of counsel concerning a five-year-old federal tax evasion offense, let alone believe that his request for counsel covers such charges.

But noticing that the defendant's request and expectations are likely to be in some sense "offense specific" is only the first step. The question is *in what way* an arraignment request is "offense specific" - or, put differently, *which* offenses are

encompassed by the defendant's arraignment request. Focusing on the defendant requires answers that include *at least* those offenses that occurred within the same transaction, prosecuted by the same sovereign. It would be the very rare (and idiosyncratic) defendant who viewed the scope of the needed representation, or the scope of his request, more narrowly. At the very least, the defendant who obtains a lawyer to represent him on a receiving stolen property and theft charges will think he has a lawyer for the legal trouble he is in due to what happened "when I stole the stuff;" he is extremely unlikely to imagine that he is represented only on the theft charge, but not on a subsequent burglary charge arising out of the same incident. *In Re Pack*, 616 A. 2d 1006 (Pa. Super. 1992) (finding those offenses closely related). Indeed, such lay impressions would more commonly focus only on whether the transaction was the same, and not whether the sovereign was the same.

The focus on temporality is partially attributable to the typical defendant's lack of legal sophistication. The ability to focus on the exact elements of the charged offense is beyond the capacity of most criminal defendants, at least at the arraignment stage; in part, such limitations are the reason the defendant needs "the guiding hand of counsel." Nevertheless, whether the offense occurred during the "same transaction" is also significant to competent, legally-sophisticated defense counsel.

Attorneys appropriately perceive the attorney-client relationship as extending beyond the charged offense *at least* to other same transaction offenses, in part because of the frequency with which an initial indictment is superseded by one that charges additional temporally-related offenses. Moreover, even with respect to the first charge, counsel can hardly develop or effectively implement a coherent strategy if the police continue to interrogate the defendant on an ongoing basis about other crimes that may have occurred during the same incident. Plea bargaining practice, as well as the inevitable and substantial overlap in evidence, compels a competent attorney to guide (or at least attempt to guide) the client with respect to the potential

prosecution of *all* "same transaction" offenses. Such guidance, of course, is impossible if police are free to approach a client to elicit additional evidence without counsel's knowledge or consent.

A focus on the attorney's half of the attorney-client relationship may help explain some lower courts' insistence that only in cases in which the same sovereign (as well as the same transaction) is involved are offenses sufficiently "closely related" to invoke the protections of *Jackson*. Certainly, competent attorneys are well aware of the possibility of dual prosecution, and in many areas, appointment practices make it unlikely that the same attorney will serve as counsel in both federal and state prosecutions. On the other hand, close cooperation between federal and state public defenders for same transaction crimes is the norm, and the likelihood of overlapping evidence suggests that many defense attorneys, like many defendants, would view interrogation concerning the same transaction as circumvention of the existing attorney-client relationship, even if it were conducted by agents of a different sovereign.

The manner in which most states pursue their legitimate investigation interests reinforces the conclusion that, at least where the same sovereign is concerned, "offense specific" encompasses any crime committed during the same transaction as the crime for which the arraigned defendant has requested or secured counsel. We are not aware of any locale in which wholly separate investigation teams are assigned to different offenses arising from the same criminal transaction.[3] Indeed, the

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[3] The Brief for the State of Texas dramatically states that Cobb confessed to capital murder "[f]ifteen months later and 500 miles away. . . based on new information." *Id.* at 28. This statement is misleading insofar as it implies that the two *investigations* were separate. Cobb was interrogated by a geographically distant police department, but that department was acting upon instructions from the same department that investigated the burglary. Moreover, while the information was in one sense "new," it stemmed from the continuing investigative actions taken by the same department that initially

(continued...)

state coordinates the investigation of all same transaction offenses for much the same reasons that defense counsel treat such offenses as falling within the same attorney-client relationship: the frequency with which additional same transaction offenses are added to an initial indictment; plea bargaining practices which treat such crimes as a package; the overlap in evidence; and the need to develop an effective comprehensive strategy for trial. Thus, there is no reason to fear that any sovereign will be misled or confused by a same transaction/same sovereign interpretation of "offense specific."

This case provides a textbook example of the need to treat same transaction offenses as falling within the scope of the *Jackson* rule. Although the record contains no evidence concerning how Cobb viewed the attorney-client relationship, it is clear that the police were very much aware of the connection between the burglary and homicide offenses. In fact, they consistently treated the attorney-client relationship between attorney Ridley and Cobb as extending to all of the same transaction offenses. Texas now emphasizes that counsel described his "representation" of Cobb as limited to the pending burglary charge. Brief for the State of Texas at 2-3, 29. Certainly it is accurate that Ridley had only been *appointed* on the burglary prior to the confession, and it is also accurate that Ridley had expressed hesitation about taking on a capital case at that time. However, when Cobb was ultimately charged with capital murder Ridley was in fact appointed to represent him on that charge as well.

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[3](...continued)
investigated both the burglary and homicides. Finally, the excuse that the interrogating Odessa police force officers were "unaware" that Cobb was represented by counsel on a closely related offense, see Brief for the State of Texas at 4, is disingenuous. Officer Judy James of the Walker County police had instructed those officers to arrest Cobb, and before interrogating him, those Odessa officers sought her permission, which she granted. James, however, knew of Cobb's indictment and the appointment of counsel pursuant to it.

More important, whether Ridley had been appointed on the capital offense at the time of the interrogation and/or ultimately served as trial counsel is beside the point. Whether he hoped a capital trial would never materialize is also beside the point. From the time he was appointed on the burglary charge, Ridley behaved as though his attorney-client relationship with Cobb extended to all same transaction charges, and the behavior of the police reflects the same common-sense view of the scope of their attorney-client relationship. Thus, on the two earlier occasions *on which police sought Ridley's permission to interrogate Cobb*, the intended topic of the interrogation was Cobb's knowledge about and involvement in the homicides, not the burglary. Then, after Cobb confessed to the murders, Ridley was informed of these developments by police and asked to come down to the jail. Finally, after Cobb's confession, police sought permission from Ridley for Cobb to accompany them to the place he had buried the bodies, a matter clearly related to the homicide charges. Thus, it is abundantly clear that everyone involved knew the burglary and homicides were "closely related."

Under such circumstances, Cobb's assertion of his *Jackson* right on the burglary charge must be deemed to encompass the capital murder charge. No lower court that has addressed this issue disagrees. *United States v. Cooper*, 949 F.2d 737 (5th Cir. 1991), cited by the state as its sole example of a "principled application of the closely related test" that would deny relief to Cobb, is not to the contrary. The state's brief quotes one sentence of the *Cooper* opinion, which states that the crimes are not closely related because they concern "different conduct" but neglects to mention the underlying facts that prompted that conclusion: In *Cooper*, unlike this case, *both* the sovereign *and* the transaction were different.[4] In fact, the *Cooper* court explicitly

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[4] Cooper obtained representation on a state burglary charge and was questioned by federal agents concerning unlawful possession of an unregistered firearm. The possession charge did not stem from the same transaction as did the burglary charge; Cooper obtained the gun on a previous
(continued...)

distinguished the facts in, and approved the result of *People v. Clankie*, 530 N.E.2d 448 (1988), on the ground that "all the charges in *Clankie* were extremely closely related, involving the same crime of burglary, victim, residence, time span and sovereign." *Cooper*, 949 F.2d at 742-744.

B. A Flexible Approach to the "Closely Related" Test Better Protects Sixth Amendment Interests.

The same transaction/same sovereign interpretation of "closely related" offenses is consistent with the generalized expectations of clients, lawyers and police. It has the additional benefit that many courts have prior experience applying it in other contexts, such as capital and felony murder prosecutions, where "in the course of the same transaction" is an element of the offense. For these reasons, it offers clear guidance to all involved. Of course, "clear and unequivocal" guidelines are desirable "only when they guide sensibly and in a direction in which we are authorized to go." *McNeil v. Wisconsin* 501 U.S. 171, 181-82 (1991). While a narrow reading of the "closely related" offense rule offers clarity, the advantage of a more flexible approach is that it captures situations outside the norm where expectations of representation extend beyond same sovereign/same transaction offenses.

Although Texas characterizes the Ninth Circuit's approach as "complex," that court's approach employs nothing more than a familiar "totality of the circumstances" test. In fact, the opinion lists only a handful of relevant factors: the identity of persons involved (including the victim, if any), and the timing,

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[4](...continued)
occasion from a friend. The only link between the two offenses was the fact that the gun was discovered in Cooper's car when police stopped the car in an attempt to arrest Cooper for the burglary. This stop, however, did not take place on the same day as the burglary, and as it turned out, Cooper was not in the car at the time it was stopped and the gun was seized. *See also, U.S. v. Carpenter*, 963 F.2d 736 (5th Cir. 1992) (same).

motive, and location of the crimes. *United States v. Covarrubias*, 179 F. 3d 1219 (9th Cir. 1999). Other cases have also considered the existence and extent of police misconduct associated with the interrogation. *See e.g., United States v. Mitcheltree*, 940 F. 2d 1329, 1339, 1342-43 (10th Cir. 1991).

This slightly more detailed analysis has the virtue of covering cases which are, given their unique fact patterns, in fact "closely related," but which the same sovereign/same transaction test would exclude. For example, if an attorney is assigned to represent a defendant on several drug sales to a particular informant, in many cases it would be inconsistent with the expectations of all relevant parties to exclude from *Jackson's* protective umbrella the lone sale to that same informant that was not included in the indictment. *Cf. United States v. Kidd*, 12 F. 3d 30 (4th Cir. 1993) (where transaction involved same type of crime as charged offenses, but "involved a different purchaser-informant, occurred at a different time and took place in a different location," offenses were not closely related). Similarly, it would often be inconsistent with predictable expectations about the scope of representation to sever two assaults against the same party that occurred within a relatively brief time frame, even if the defendant left the victim's premises in the interim. *See United States v. Arnold*, 106 F. 3d 37, 41 (3rd Cir. 1997) (holding that, under all the circumstances, the attempted murder of a witness was "closely related" to the witness intimidation charge despite a temporal gap). Finally, and most persuasively, the same sovereign/same transaction test will be underinclusive where two sovereigns collude or at least cooperate. *United States v. Doherty*, 126 F. 3d 769 (6th Cir. 1997).

Whether this Court adopts the same sovereign/same transaction or a more sensitive version of the "closely related" offense rule, *the state must bear the burden* of showing that the offenses are *not* closely related when the defendant has asserted his Sixth Amendment right on a pending charge. Under either approach to the "closely related" offense test, that burden is

impossible to meet where, as here, the same transaction and the same sovereign are involved.

IV.
THE *BLOCKBURGER* "SAME OFFENSE" TEST IGNORES BOTH PRECEDENT AND VITAL DIFFERENCES BETWEEN THE RIGHT AGAINST INTERFERENCE IN THE ATTORNEY-CLIENT RELATIONSHIP AND THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The Double Jeopardy Clause of the Fifth Amendment bars multiple punishment for, and multiple prosecutions of, the "same offense." For double jeopardy purposes, if "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Texas and its supporting *amici* urge this Court to adopt this "same elements" test for Sixth Amendment violations. Brief for the State of Texas at 20; Brief for the United States at 13. Contrary to the assertions of both, this attempted transplant of double jeopardy jurisprudence has neither support in this Court's precedents nor any perceptible link to Sixth Amendment values.

A. Precedent Precludes Equating the Fifth Amendment Double Jeopardy "Same Offense" Test with the Sixth Amendment "Offense Specific" Test.

Before turning to precedent, it is instructive to begin with what comes before precedent: the plain language of the amendments. The Fifth Amendment's double jeopardy prohibition applies to the "same offense," whereas the Sixth Amendment's guarantee of the assistance of counsel extends to "criminal prosecutions." The fact that the Framers of the Bill of Rights chose different phrases - in consecutive amendments, no less - when they could have used the same phrase suggests that the two protections differ in the scope of their applications. "It

is too clear for understanding that the phraseology was adopted understandingly and with a purpose." *Cf. Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873)(comparing the phrase "citizen of the state" with "citizens of the United States").

Not only do the two clauses use different language, but it is plain from that language which provision sweeps more broadly. In comparing "same offense" to "criminal prosecution" it is apparent that the noun, "offense" is narrower than is "prosecution," and that the adjective "same" is uniquely restrictive, while "criminal" merely splits the courts' docket in two parts.

Far from ameliorating the plain meaning obstacles to this attempted equation of "same offense" and "criminal prosecution," the case law amplifies them. First, this supposed "same offense" test has a remarkable judicial history; the *only* judicial opinion that refers to it at all in the Sixth Amendment context does so disparagingly. *McNeil v. Wisconsin*, 501 U.S. 171, 187 (1991) (Stevens, J., dissenting) ("I trust [the] boundaries [of the offense specific limitation on *Jackson*] will not be patterned after the Court's double jeopardy jurisprudence. . . "). Even more telling, a Sixth Amendment "same offense" doctrine cannot be squared with this Court's decisions in either *Brewer v. Williams*, 430 U.S. 387 (1977) or *Maine v. Moulton*, 474 U.S. 159 (1985). In *Brewer*, this Court held that the commencement of legal proceedings against a defendant *who had been appointed counsel on kidnaping charges* required reversal of a conviction *on murder charges* due to the introduction into evidence of incriminating statements deliberately elicited from that defendant in the absence of counsel. Obviously, kidnaping is not the "same offense" as murder; kidnaping, unlike murder, requires asportation against the victim's will and murder, unlike kidnaping, requires the death of the victim. In contrast to the discordance of this result with the "same offense" test , either version of the "closely related" offense test presently employed by the lower courts is consistent with the result in *Brewer*.

Texas's claim that this Court's precedents establish the applicability of the "same offense" rule in the Sixth Amendment setting is equally impeached by *Moulton*. The Court affirmed the reversal of Moulton's theft convictions, for which he had been indicted prior to his uncounseled interrogation, a result that is consistent with the "same offense" test and with both versions of the "closely related" offense test. However, this Court also upheld the reversal of Moulton's conviction for the factually interrelated burglary offense with which he was subsequently charged, a result that cannot be squared with the state's "same offense" argument. Under Maine law, burglary is not the "same offense" as theft; where "theft," unlike "burglary," requires actually taking or exercising unauthorized control over the property of another, and "burglary," unlike theft requires entering a building. *Compare*, Me. Rev. Stat. Ann. 17-A§353 (1983) *with* Me. Rev. Stat. Ann. 17-A§401 (1983). In contrast, either variation of the "closely related" offense test set forth in Section III would compel reversal of the burglary offense as well as the theft offense.

Despite these inconsistencies, Texas and its *amici* insist that *Brewer* and *Moulton* can be reconciled with the "same offense" test. In the end, Texas and the United States are reduced to arguing that this Court failed to *notice* that neither the theft and burglary offenses in *Moulton*, nor the kidnaping and murder offenses in *Brewer*, constitute the "same offense." Brief for the State of Texas at 15, 20n.5; Brief for the United States at 22-23. Their efforts, however, are far from persuasive.

Brewer generated no fewer than three separate and vigorous dissents. Not one of these opinions suggested that Williams had no Sixth Amendment right to counsel on the murder charge because counsel had been secured only for the kidnaping charge. The opinions in *Moulton*, although not quite as contentious, *explicitly* focused on the distinction between the admissibility of "evidence pertaining to pending charges" and "evidence pertaining to charges *as to which the Sixth Amendment right to counsel had not yet attached.*" *Id.* at 179-180. Thus to claim that

members of this Court would have decided these cases differently but for the fact that none of them *recognized* the obvious fact that the pertinent offenses were not the "same offenses" goes beyond arrogance; it is fantasy. [5]

B. The Defendant's Interest in the Double Jeopardy Context differs from the Defendant's Interest under the Sixth Amendment.

According to the Solicitor General, "Now that the Court has adopted the same-elements test in interpreting the word 'offense' under the Fifth Amendment, it would be highly anomalous for the Court to conclude that the Sixth Amendment's offense-specific rule is to be applied not only by examining the elements of the charged and uncharged offenses, but also by asking whether the offenses are 'very closely related factually.'" Brief for the United States at 24. This statement starts with a mischaracterization of the double jeopardy bar; it is not "offense" that this Court's prior holdings have interpreted in that area but "*same* offense." Thus, what actually would be "highly anomalous" is for this Court to accept the Solicitor General's position that the word "same" is completely devoid of constitutional significance. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819) ("It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,' with that which authorizes Congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning

[5] That *McNeil v. Wisconsin*, 501 U.S. 171 (1991)was decided after *Brewer* and *Moulton* cannot resolve the inconsistency between double jeopardy jurisprudence and Sixth Amendment precedent. In fact, *McNeil* quotes with approval *Moulton*'s distinction between offenses to which the Sixth Amendment has attached and those to which it has not. *McNeil* at 175-76.

of the word 'necessary' by prefixing the word 'absolutely.') (emphasis in original).

Furthermore, analogies from one Amendment to another are always risky because underlying differences in the interests the Amendment or Clause are designed to protect may render such analogies "inapt." *United States v. Gouveia*, 467 U.S. 180, 189-190 (1984). Relying on such differences, this Court in *Gouveia* declined the proffered analogy between speedy trial rights and the right to counsel. Similarly, in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), this Court declined to apply Fifth Amendment right to counsel rules to Sixth Amendment right to counsel cases, again citing differences, albeit smaller ones, between the two rights. Here Texas and the United States propose an analogy that is far less valid, due to more substantial differences in the interests at stake.[6]

The double jeopardy clause serves two functions: It protects against successive prosecutions and it precludes multiple punishments for the same offense. A defendant's interest in the first protection is avoiding "embarrassment, expense, and ordeal ... anxiety and insecurity," caused by "repeated attempts" to convict him of an alleged offense. *Green v. United States*, 355 U.S. 184, 187 (1957). The second interest is to avoid "punishment that exceeds . . . legislative authority." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Both of these interests suggest a focus on the elements of the offenses at stake. To distinguish a "repeated attempt" from the prosecution of a new offense, consideration of how the offenses differ is necessary. Similarly, determining

[6] The briefs for Texas and the United States both rely heavily upon *McNeil*, and emphasize differences between the assertions of a Fifth and a Sixth Amendment right to counsel. Despite their differences, the two rights to counsel involve related, though not identical, values and interests, as well as a closely related course of doctrinal development. It is therefore more than ironic to see them boldly leap to transplant a standard from the Double Jeopardy Clause, a Clause that has neither a thematic nor a historical connection to this Court's Sixth Amendment jurisprudence.

what amount of punishment "exceeds" that which is authorized requires close examination of the statute and the underlying legislative intent.

The purposes of the Sixth Amendment right to counsel, and the corresponding interests protected by that right, are quite different. The Sixth Amendment is designed "to protect the unaided layman at critical confrontations with his adversary." *Gouveia*, 467 U.S. at 189. Consequently, the defendant has an interest in having an expert assist him in all dealings with a sophisticated and committed adversary. As discussed above, the "closely related" test, unlike the "same offense" rule, was formulated by lower courts to protect precisely that interest.

The contrast between the state's competing interest in the double jeopardy context and its very different interest in the Sixth Amendment context further underscores the inaptness of employing a double jeopardy standard to assess the meaning of *Jackson* invocations. The state has a unique interest in limiting the reach of the double jeopardy bar because its opportunity to *ever* prosecute a criminal offense is at stake. Thus, applying a "closely related" rule to double jeopardy cases would often force the state to choose between prompt prosecution of a serious offense and foregoing prosecutions of other (and sometimes more serious) offenses. The narrow words chosen for the double jeopardy clause by the Framers, ,"*same* offense," reflect the compelling nature of this interest. On the other hand, in the *Jackson* context, the state's interest in such a narrow rule is much weaker. Interpreting "offense specific" to mean "closely related" offense creates no bar to future prosecution for *any* offense. Indeed, the "closely related" offense rule does not even create an absolute bar to using the accused as a source of information; the accused on his own may choose to approach the police, or counsel may decide that speaking with the police is in the defendant's interest. The impact of a "closely related" offense rule in a Sixth Amendment context has one further limit: Even those statements within *Jackson's* protective scope may be used for impeachment. *Michigan v. Harvey*, 494 U.S. 344 (1990).

Even in the double jeopardy setting, where the language of the clause, the nature of the defendant's interest, and the strength of the state's competing interest *all* weigh more heavily toward a narrow test, the history of the relevant doctrine includes periods of experimentation with a broader test. *See e.g., Grady v. Corbin*, 495 U.S. 508 (1990) (adopting a "same-conduct" test). Considering all these relevant circumstances, inserting the peculiarly narrow double jeopardy standard into Sixth Amendment jurisprudence would be surprising. In contrast, affirming of the lower courts' sensitivity to language, history and context as expressed in the "closely related" offense test would not be surprising at all.

C. Adopting a "Same Offense" Test Would Lead to Bizarre Results and Encourage Offense Manipulation.

The fact that the "same offense" test would yield unpredictable results and encourage police and prosecutorial activity injurious to existing attorney-client relationships also argues against its adoption. Applying that test to the facts of this case provides one compelling example of its destructive effects, and makes it obvious that such a test invites similar effects in many other contexts.

In attempting to establish the separate nature of the burglary and capital murder offense, Texas obscures the degree to which the two offenses are inextricably linked, and sidesteps the fortuity of the circumstances that now permit it to argue in favor of the "same offense" test. The state's brief rather cryptically states that "Cobb was not convicted of capital murder based on the predicate felony of burglary; he was initially indicted for that offense also, but the government abandoned that part of the indictment before trial." Brief for the State of Texas at 28. In fact, Cobb was initially indicted *for the capital murder of Margaret Owings* under two theories: 1) Murder in the course of a burglary and 2) Murder in the course of the same transaction in which he killed Kori Owings. The evidence for these two offenses would have been not merely overlapping but identical. Moreover, the

state did not "abandon" the first count until *after* the suppression hearing, at which time counsel for Cobb pointed out the overlap between the "burglary" and "capital murder in the course of burglary" charges. This sequence of events does not support the "utmost good faith" that Texas protests.

True, the police did not manipulate the charges, see Brief for the State of Texas at 29.[7] Manipulation was left for the legally trained minds that took over after the police had finished with their work. But the state's next assertion goes beyond misleading protest all the way to mendacity. To claim, as their brief does, that "[The police] independently investigated offenses that, as it turned out when Cobb revealed the truth, were linked by a common circumstance," is simply untrue. The testimony of the officers involved in the case reveals that the investigations were linked from the start, and that it was their linkage--both in personnel and in subject matter--that eventually led Officer Judy James to speak to Cobb's father, who confronted Cobb, and then called James back to give her the information upon which Cobb's arrest was based.

The brief for the United States studiously avoids endorsing Texas's factual assertions. Indeed, it avoids discussing these inconvenient and troublesome facts at all. Moreover, neither Texas nor the United States acknowledges that their arguments for a "same offense" standard are supportable only because of the tragic *fortuity* that two victims were involved: Considering the entire course of conduct of the police in this case it is simply inconceivable that they would have behaved any differently if only one victim had been killed. But if only one victim had been involved, under the state's theory, the actions of the police would have been improper because capital murder in the course

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[7] The police did, however, manipulate Cobb's counsel. Detective Funk testified that she had always viewed Cobb as a suspect, but police told Ridley that Cobb was not a suspect. *After* he permitted the police to interrogate Cobb the second time, the sheriff told Ridley that he had always thought Cobb had committed the murder, but was (at that time) unable to prove it.

of a burglary is the "same offense" as burglary. Perhaps the state could have cured that defect as well, though the cure would have saved Cobb from a death sentence; if Cobb had been indicted only for capital murder in the course of a burglary, the state could have simply "abandoned" that indictment, and re-indicted him for noncapital murder. In such a circumstance, the conduct of the police would once again become consistent with their "same offense" construction of the Sixth Amendment.

Such hyper-technical analysis does not comport with what the police were thinking, what counsel was thinking or what Cobb was thinking regarding the scope of his invocation of the right to counsel. Nor are these bizarre consequences limited to the capital murder context. Under the double jeopardy "same offense" test, it would appear that, even if only *one sovereign* and *one transaction* were involved, the police could initiate an uncounseled interrogation of an arraigned defendant: 1) on burglary charges despite his representation on larceny charges (contrary to *Moulton*); 2) on murder charges despite his representation on kidnaping charges (contrary to *Brewer*); 3) on intentional murder charges (after the victim dies) despite his representation on aggravated assault charges *providing* that the state had alleged an aggravating factor of possession of a weapon; 4) on forcible rape charges despite his representation on statutory rape charges; 5) on possession of a specified quantity of a controlled substance despite his representation on charges of sale of an unspecified quantity of the same controlled substance; and 6) on robbery charges despite his representation on grand larceny charges.

These half-dozen examples suffice to demonstrate that the state's test would carve up the attorney-client relationship in ways that bear no correspondence to *anyone*'s understanding of

the right to the "guiding hand of counsel."[8] Moreover, even a quick perusal of the list in the preceding paragraph belies the state's assertion that "there is little or no strategic advantage to selective charging," Brief for the State of Texas at 25.

Clients with limited legal sophistication can hardly be expected to navigate these waters. They will not understand that, although they asked a judge for counsel once and the *same police* came back to question them again *about the same events*, they need to ask those same police for counsel again, after which the police will have to leave them alone. Attorneys will not know when particularly vulnerable clients are adequately protected by a request for counsel and when they are not; they will not know what they can do to further protect their clients or their trial strategy. Ironically, this potential for manipulation would not be an unmitigated blessing for the state; one of the most pronounced effects of a "same offense" test would be confusion, a confusion likely to be shared by the police. Police will not know when they should ignore representation regarding the same transaction. Presumably they will have to guess when they will uncover not just more evidence, but evidence that proves an additional offense with different elements. And when they are wrong, the state will wish to proceed on the original charge. But at that point, having violated the defendant's Sixth Amendment rights, the state may be asked to demonstrate either the independent source or the inevitable discovery of the evidence it plans to present. *Nix v. Williams*, 467 U.S. 431 (1984).

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[8] All attorneys are ethically barred from "knowingly communicating with a represented person about the subject matter of the representation without the consent of that person's lawyer." ABA Model Rule of Professional Responsibility, 4.2. Surely it would be a surprise to a civil defendant's lawyer that the plaintiff's attorney could approach his client regarding the accident in dispute to investigate additional causes of action. Rather, matters outside "the subject matter of the representation," are matters arising from different transactions. *See* Ronald D. Rotunda, LEGAL ETHICS §32-4 (listing examples).

To abandon precedent and reason, as Texas advocates, would reward and punish without respect to the constitutional values that undergird the Sixth Amendment.

CONCLUSION

Because the "same offense" test advocated by Texas is destructive of the attorney-client relationship, arbitrary with respect to the relationships it covers, and provides incentives for manipulation, it should be rejected. In contrast, the "closely-related" offense test embraced by the lower court is tailored to Sixth Amendment values and should not be abandoned for the illusion of symmetry. Therefore, the decision of the Court of Criminal Appeals of Texas should be affirmed.

Respectfully submitted,

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APPENDIX A

ASSIGNED TO THE 12TH JUDICIAL DISTRICT COURT
NO. 18,920
THE STATE OF TEXAS VS. RAYMOND LEVI COBB
CHARGE: SECTION §19.03. CAPITAL MURDER

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY, for the County of Walker, State of Texas, duly selected, empanelled, sworn, charged and organized as such at the July Term, A.D. 1995, of the District Court for said County, upon their oaths present in and to said Court at said term that Raymond Levi Cobb, Defendant, on or about the 27th day of December, A.D. 1993, and before the presentment of this indictment, in the county and State aforesaid, did then and there

> intentionally and knowingly cause the death of an individual, namely, Margaret Owings, by stabbing her with a knife, and by manner and means unknown to the grand jury, and did then and there intentionally and knowingly cause the death of another individual, namely, Kori Rae Owings, by suffocation, and by manner and means unknown to the grand jury, and both murders were committed during the same criminal transaction,
>
> And the defendant did then and there intentionally cause the death of an individual, namely, Margaret Owings, by stabbing her with a knife, and by manner and means unknown to the grand jury, and the defendant was then and there in the course of committing and attempting to commit the offense of burglary of a building of Lindsey Owings, who was the owner of said building,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

_____
Foreman of the Grand Jury